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No. _____

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In The

Supreme Court of the United States

JAMES GARDNER, JR.,

Petitioner,

vs.

HEARTLAND EXPRESS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. MOCK
Counsel of Record
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, Iowa 50309-8004
(515) 243-4191
Counsel for Petitioner James Gardner, Jr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. Whether an injured worker's constitutional right of due process is violated when a statutory amendment limiting benefits available to non-residents of Iowa, enacted after the worker's claim for workers' compensation benefits accrued and vested, is applied retroactively to dismiss the non-resident worker's claim on jurisdictional grounds?

PARTIES

The only parties to the case are those listed in the caption (*i.e.*, James Gardner, Jr. and Heartland Express, Inc.). Because this Petition for Writ of Certiorari calls into question the constitutionality of the retroactive application of Iowa Code § 85.71(2) (1997), service of this Petition for Writ of Certiorari shall also be made upon the Attorney General for the State of Iowa pursuant to 28 U.S.C. § 2403(b) and U.S. Supreme Court Rule 29(4)(c).

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Heartland Express v. Gardner, Ruling on Pet. for Jud. Rev., Law No. CV3951 (Polk Cnty. Dist. Ct. June 5, 2002) (unreported; copy included in the Appendix to this Petition for Writ of Certiorari).

Gardner v. Heartland Express, Inc., Appeal Dec'n, File No. 1074594 (Iowa Workers' Comp. Comm'r Jan. 15, 2002) (unreported; copy included in the Appendix to this Petition for Writ of Certiorari).

Gardner v. Heartland Express, Inc., Arbitration Dec'n on Rehr'g, File No. 1074594 (Iowa Workers' Comp. Comm'r Mar. 7, 2001) (unreported; copy included in the Appendix to this Petition for Writ of Certiorari).

JURISDICTIONAL STATEMENT

Petitioner James Gardner, Jr. ("Gardner") seeks review by this Court of the final decision entered by the Iowa supreme court on December 17, 2003, and amended on denial of Gardner's motion for rehearing on February 27, 2004. *Heartland Express v. Gardner*, 675 N.W.2d 259 (Iowa 2003), *amended on denial of rehr'g* (Feb. 27, 2004) (copy included in the Appendix to this Petition for Writ of Certiorari). Gardner asserts in this Petition for Writ of Certiorari that the Iowa supreme court erred in retroactively applying a statutory amendment to extinguish his accrued and vested claim for workers' compensation

benefits in violation of his constitutional right of due process. Consequently, this Court has discretionary appellate jurisdiction to review this case. 28 U.S.C. § 1257 (2004) (final judgments of a state's highest court are reviewable by the Supreme Court to determine whether a state statute violates the Constitution).

CONSTITUTIONAL PROVISIONS AND STATUTES

- The Due Process Clause of the United States Constitution (Amend. XIV, § 1) provides, in pertinent part:

  > No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

- Iowa Code § 85.71(2) (1993) (pre-amendment) provides, in pertinent part:

  Employment outside of state.

  > If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of death, the employee's dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of death resulting from such injury, the employee's dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:
  >
  > . . . .

2. The employee is working under a contract of hire made in this state in employment not principally localized in any state, or . . . .

- Iowa Code § 85.71(2) (1997) (post-amendment) provides, in pertinent part:

Injury outside of state.

If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of death, the employee's dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of death resulting from such injury, the employee's dependents, shall be entitled to the benefits provided by this chapter, if at the time of such injury any of the following is applicable:

. . . .

2. The employee is working under a contract of hire made in this state in employment not principally localized in any state and the employee spends a substantial part of the employee's working time working for the employer in this state. . . .

STATEMENT OF THE CASE

The relevant facts are not in dispute, and have been set out in detail in the underlying administrative agency and court decisions. (App., pp. 23-26, 61-69). By way of brief background, Petitioner James Gardner, Jr. ("Gardner") was a Georgia resident employed as an over-the-road

truck driver by Heartland Express, Inc. ("Heartland"), a corporation based in Coralville, Iowa. (App., p. 23). Gardner's work was assigned by and managed through Heartland's Iowa offices, but his work took him to a number of states. (App., p. 23).

Gardner sustained an injury to his low back on February 16, 1994 while performing his work duties for Heartland. (App., pp. 24, 63). Heartland accepted the injury as being compensable under Iowa's workers' compensation laws and provided medical benefits and healing period benefits. *See* Iowa Code §§ 85.27, 85.34(1). Heartland directed Gardner to treat with a number of different doctors, and Gardner eventually underwent four separate surgical procedures on his low back between July 1994 and April 1996. (App., pp. 24-25, 63-64). Gardner was determined to have reached maximum medical improvement in December 1996. (App., pp. 25, 64-67).

Because of his extensive medical treatment, Gardner has been unable to work from February 1994 to the present, except for a few short-lived attempts to return to part-time employment. (App., p. 25). A functional capacity evaluation performed in July 1997 determined Gardner likely could not return to truck driving work, despite being "highly motivated" to do so. (App., pp. 25, 65). Gardner attempted to return to truck driving work, but could not do so because of his continued pain and functional limitations. (App., p. 25). It should also be noted that Gardner was forced to sell his tractor (the front part of a tractor-trailer or semi-truck) because he could not afford to make payments on it while off work from his injury. (App., p. 25).

On May 20, 1997, the Iowa legislature amended the section of the Iowa Workers' Compensation Act which

provides benefits to workers, like Gardner, who are injured outside the state of Iowa. *See* 1997 Iowa Acts ch. 106, § 1 (amending Iowa Code § 85.71). At the time of Gardner's injury in December 1994, benefits were available to workers injured outside Iowa if "[t]he employee is working under a contract of hire made in this state in employment not principally localized in any state". Iowa Code § 85.71(2) (1993). However, effective July 1, 1997, the statute was amended to provide benefits only if "[t]he employee is working under a contract of hire made in this state in employment not principally localized in any state *and the employee spends a substantial part of the employee's working time working for the employer in this state.*" Iowa Code § 85.71(2) (1997) (amended language in italics).

On February 8, 1999, Gardner filed a petition with the Iowa workers' compensation commissioner[1] ("commissioner") seeking additional workers' compensation benefits. Although just over four years had passed since the injury, Gardner's claim was still timely filed because the Iowa Workers' Compensation Act has a "rolling" statute of limitations which provides that, where an employer has voluntarily paid weekly compensation (temporary or permanent disability benefits), a claim must be filed within three years of the date of last payment of weekly benefits. Iowa Code § 85.26(1).

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[1] In Iowa, the workers' compensation commissioner is the name for the administrative agency responsible for administering workers' compensation benefits, as well as the title for the administrative head of that agency. *See* Iowa Code § 86.1.

A hearing was held before a deputy workers' compensation commissioner[2] on November 6, 2000. (App., p. 61). During the hearing, Heartland's attorney, Mr. Spencer, suddenly asserted an issue of "subject matter jurisdiction" during his cross-examination of Gardner. (App., pp. 25, 79-84). Essentially, Heartland argued that the 1997 amendment to Iowa Code § 85.71 should apply to Gardner's claim, rather than the statute in effect at the time of his injury in 1994. The deputy summarily ruled against Heartland's argument on the merits immediately on the record, and later noted his ruling in the Arbitration Decision on Rehearing[3] entered on March 7, 2001. (App., pp. 77, 84). The deputy also awarded Gardner extensive workers' compensation benefits, including additional healing period benefits and three hundred seventy-five (375) weeks of permanent partial disability (a/k/a "industrial disability") benefits. (App., pp. 25, 69-73, 77-78). Pursuant to Iowa law, Gardner was also entitled to lifetime medical benefits related to his injury. Iowa Code § 85.27. Gardner also had the right to seek additional permanent disability benefits in the event his condition worsened, by use of a "review-reopening" proceeding. Iowa Code §§ 85.26(2), 86.14(2).

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[2] "Deputy commissioner" is simply the title for those administrative law judges who are assigned exclusively to hear workers' compensation contested cases. Iowa Code §§ 86.2, 86.17.

[3] The Arbitration Decision on Rehearing replaced an initial Arbitration Decision entered on January 24, 2001; the rehearing decision was necessary because Heartland's counsel apparently took his exhibits with him after the hearing, rather than leaving them with the deputy. (App., p. 61).

Heartland filed an intra-agency appeal of the award; a chief deputy workers' compensation commissioner was assigned to review the claim *de novo*. The chief deputy summarily affirmed the award of benefits in an Appeal Decision entered on January 15, 2002. (App., pp. 26, 59-60). Heartland sought judicial review in the Iowa district court, and the district court likewise affirmed the award. (App., pp. 26, 44-58). The deputy, chief deputy, and district court all ruled that Gardner's claim was governed by the version of Iowa Code § 85.71(2) in effect at the time of his injury in 1994, and that the 1997 amendment could not be retroactively applied to his claim. (App., pp. 25-26, 49-51, 59, 77, 84).

Heartland appealed to the Iowa supreme court, which reversed the award of benefits, holding that the 1997 amendment to Iowa Code § 85.71 applied retroactively to Gardner's claim, and that his claim had to be dismissed for lack of "subject matter jurisdiction" under the amended statute.[4] (App., pp. 22-43). Although Gardner had raised his constitutional due process argument in his brief, the Iowa supreme court simply declined to address this issue, stating *in a footnote*: "We make no comment on what, if any, constitutional issues might also arise from the application of section 85.71(2) in its current form." (App., p. 39, n. 5). Gardner filed a timely petition for rehearing, specifically asking the Iowa supreme court to address the

[4] As will be discussed later in this Petition, a significant issue was raised as to whether Iowa Code § 85.71 truly is a "subject matter" jurisdiction statute (*i.e.*, provides jurisdiction over a general class of claims), or whether it simply limits benefits available to out-of-state workers in certain circumstances (*i.e.*, provides authority to grant relief on the merits of particular claims). *See infra*, Argument, § D.

constitutional due process issue; the court summarily denied the petition for rehearing, although some editorial changes to the original decision were made. (App., pp. 1-3). The court's decision on rehearing was entered February 27, 2004. (App., p. 1).

Because of the Iowa supreme court's refusal to address the issue, and because of the significant harm to himself and other similarly situated injured workers[5] in the event the retroactive application of the amended statute is allowed to stand, Gardner now seeks a determination of the merits of his constitutional due process claim in this Court. Also, this case may provide this Court an opportunity to clarify and/or reconcile its apparently conflicting approaches to analysis of retroactive application of statutes.[6]

ARGUMENT

I. Whether an injured worker's constitutional right of due process is violated when a statutory amendment limiting benefits available to non-residents of Iowa, enacted after the worker's claim for workers' compensation benefits accrued and vested, is applied retroactively to dismiss the non-resident worker's claim on jurisdictional grounds?

A. Presumption against retroactive application. Under Iowa law, there is a presumption that statutes and

[5] *See infra*, Argument, § E.

[6] *See infra*, Argument, § A.

amendments to statutes will only apply prospectively, unless the legislature specifically indicates the statute is to be given retroactive effect:

> The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent. Generally the courts have evolved a strict rule of construction against a retrospective operation, and in fact indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it to operate prospectively only, and not retroactively. . . . We have subscribed to the rule that retroactive laws are not looked upon with favor, but with disfavor, and we have always been loath to give statutes that effect unless the General Assembly clearly signifies or expresses that intent. Especially where as here the right affected is substantive, we favor a prospective interpretation.

Manilla Comm. Sch. Dist. v. Halverson, 101 N.W.2d 705, 708 (Iowa 1960) (citations omitted); *Grant v. Norris*, 85 N.W.2d 261, 266 (Iowa 1957) ("It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation"). This presumption of prospective application of statutory amendments has even been codified: "A statute is presumed to be prospective in its operation unless *expressly* made retrospective", Iowa Code § 4.5 (1997) (emphasis added), and "The re-enactment, revision, amendment, or repeal of a statute does not affect: . . . Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder . . . . " Iowa Code § 4.13(2) (1997).

This Court likewise has long followed the principle that statutes are to be given retroactive effect only when

the statute provides a clear indication that the legislature or Congress intended the statute to apply retroactively:

> "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." . . . This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Bennett v. New Jersey, 470 U.S. 632, 639, 105 S. Ct. 1555, 1560 (quoting *Bradley v. Richmond School Board,* 416 U.S. 696, 720, 94 S. Ct. 2006, 2020, 40 L. Ed. 2d 476, ___ (1974)); *accord Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493, ___ (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *see also Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840-58, 110 S. Ct. 1570, 1579-88, 108 L. Ed. 2d 842 (1990) (Scalia, J. concurring) (discussing this Court's history of refusing to apply statutes retroactively).[7]

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[7] This Court's holding in *Bradley* is actually in tension with this Court's holding in *Bowen*, insofar as *Bowen* supports the traditional presumption against retroactivity, while *Bradley* supports a more recent presumption favoring retroactivity, unless retroactive application would result in "manifest injustice." *Compare Bradley*, 416 U.S. 696, 716, 94 S. Ct. 2006, 2019, 40 L. Ed. 2d 476, ___ *with Bowen*, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493, ___. Justice Scalia has discussed this conflict extensively in concurring opinions in *Kaiser*,

(Continued on following page)

In a strikingly similar case, the Oklahoma supreme court confronted essentially the converse of the present case – whether a workers' compensation statute extending benefits to injuries occurring out of state could be applied retroactively. *Phillips v. H.A. Marr Grocery Co.*, 295 P.2d 765, 768-69 (Okla. 1956). The *Phillips* court held that the statute was not, "purely procedural but on the contrary it deals with substantive rights", and consequently, the statute could not be applied retroactively. *Id.*

In the present case, the 1997 amendment to Iowa Code § 85.71 was enacted on May 2, 1997. 1997 Iowa Acts ch. 106, § 1. Because the act did not specify a particular date when the amendment would take effect, the statutory default date of July 1, 1997 applied. *See* Iowa Code § 3.7(1) (1997). Obviously the Iowa legislature did not expressly indicate the 1997 amendment should be implemented retroactively. The question now becomes whether, despite the lack of any indication of legislative intent to apply the 1997 amendment retroactively, the Iowa supreme court properly construed the 1997 amendment to give it retroactive effect and divest Gardner of his workers' compensation claim.

B. Gardner's vested property right. In reaching its decision in this matter, the Iowa supreme court erred in focusing on the date of filing of the petition, rather than

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supra, and *Landgraf v. USI Film Products*, 511 U.S. 244, 286, 114 S. Ct. 1522, 1522 (1994) (Scalia, J., concurring). Regardless, the "manifest injustice" of depriving Gardner of his vested workers' compensation claim seems to make the precise analytical approach less important in the present case, since both approaches should lead this Court to a presumption against retroactivity.

the date of the injury, as the date governing the application of the amended version of Iowa Code § 85.71. (App., pp. 34-36). What the court's analysis failed to recognize is that *Gardner's claim had accrued and vested as of the date of his injury, and consequently could not be divested by any subsequent legislative action.*

Under well-established Iowa law, once a party's legal claim accrues, that claim is a vested property right which is immune from any substantive legislative change:

> The legislature may not extinguish a right of action that has already accrued to a claimant. A cause of action accrues when an aggrieved party has a right to institute and maintain a lawsuit. When a cause of action has accrued, the party owning the action has a vested interest in it.
>
> New legislation that takes away a cause of action, which previously existed either through legislation or the common law or creates new rights, is substantive legislation. Because substantive legislation cannot extinguish vested rights, such legislation can only operate prospectively.

Dolezal v. Bockes, 602 N.W.2d 348, 351 (Iowa 1999) (citing *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 461 (Iowa 1989)) (citations omitted).

The *Thorp* decision is directly on point and controlling in this matter. In *Thorp*, the Iowa supreme court was confronted with the issue of whether several amendments to the Iowa Dram Shop Act which had been enacted in 1986 applied to a prior injury (death) occurring in 1985. The plaintiffs' claim had been dismissed by the trial court because it did not meet the requirements of the amended

statute, even though the claim had met the requirements of the statute as it stood at the time of the injury. The *Thorp* court held:

> . . . once a cause of action accrues, the injured person's interest in the cause of action vests. *It is well-settled that the legislature may not extinguish a right of action which has already accrued to a claimant.* "There is a vested right in an accrued cause of action. . . . A law can be repealed by the law giver; but the rights which have been acquired under it, while it was in force, do not thereby cease. . . . "

Thorp, 446 N.W.2d at 460-61 (emphasis added). The *Thorp* court then determined that a claim "accrued" and "vested" when a claimant had a legal right to bring the claim. *Id.* Applying those principles, the court held that the statutory dram shop claim accrued and vested at the time of the injury in 1985, and that the subsequent 1986 amendments could not be applied retroactively to divest the plaintiffs of their claim.[8] *Id.* at 461-63.

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[8] The Iowa supreme court has consistently reached the identical conclusion when confronted with this issue. *See, e.g., Vinson v. Linn-Mar Comm. Sch. Dist.*, 360 N.W.2d 108, 121 (Iowa 1984) (subsequent amendment to a municipal liability statute which barred punitive damage claims was, "substantive rather than merely remedial. It takes away a right of recovery that previously existed and does not give a party a remedy where none or a different one existed previously. The amendment is therefore not applicable to plaintiff's action."); *Pfiffner v. Roth*, 379 N.W.2d 357, 360 (Iowa 1985) ("this plaintiff had a right of recovery against the city under the old law but would have none under the new one. Ordinarily, we will not give retrospective effect to an amendment when it has that effect.").

The next analytical step is to determine when Gardner's workers' compensation claim "accrued." The Iowa supreme court has made it clear that a claim "accrues" when "an aggrieved party has a right to institute and maintain a suit." *Thorp*, 446 N.W.2d at 460. In the case of a claim for personal injury, whether under the common law or by statute, a claim accrues on the *date of injury*. *Id.* at 460-61 (reviewing several cases where various personal injury claims were found to accrue on the date of injury). Once a claim accrues, a claimant has a vested property right in his legal claim. *Id.*

Under Iowa workers' compensation law, an injured worker's claim accrues upon the *date of injury* – at that time, all the necessary elements to maintain an action have occurred (*e.g.*, an injury "arising out of and in the course of employment"), and the worker is entitled to pursue a claim for benefits. *See Swartzendruber v. Schimmel*, 613 N.W.2d 646 (Iowa 2000) (holding that statute of limitations begins to run from the date of injury unless discovery rule applies). The mere fact a worker may not actually file a claim until a later date does not change the fact his claim has already accrued and vested. The Iowa supreme court has specifically recognized that the *date of injury* controls applicable law for purposes of workers' compensation claims[9]:

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[9] Most, if not all, states also follow this principle, and apply workers' compensation statutes in effect at the time of the injury rather than retroactively applying subsequent amendments: "Under the usual rule, the law on the date of injury controls the rights of the parties with regard to the claim." *Meade v. Reedy Coal Co.*, 13 S.W.3d 619, 620 (Ky. 2000); *see also Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 438 n. 13 (Alaska 2000) (statute of limitations in effect at time of injury governed

(Continued on following page)

> The date of injury is an important determination given that "a number of important questions cannot be answered unless a date of injury or accident is fixed, such as which employer and carrier is on the risk, whether notice of injury and claim are within the statutory period, *whether statutory amendments were in effect*, which wage basis applies, and many others."

Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992) (quoting 1B A. Larson, *Workers' Compensation* § 39.10 (1991)) (emphasis added).

In the present case, the Iowa supreme court mistakenly focused on the law in effect at the time the petition was filed, rather than at the time of the injury, in determining whether the 1997 amendment to section 85.71 was applicable. (App., pp. 34-36). This analysis was erroneous,

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claim); *Esposito v. Waldbaums, Inc.*, 827 A.2d 747, 751 (Conn. Ct. App. 2003) ("the rights and obligations of the employer and employee are assessed at the date of injury. . . . Consequently, in the workers' compensation context, 'the date of injury rule . . . functions as a presumption of legislative intent . . . against retroactive application of a statute.'"); *Styles v. Broward Cnty. Sch. Bd.*, 831 So. 2d 212, 213 (Fla. Dist. Ct. App. 2002) ("The date of accident determines the substantive law applicable in workers' compensation cases."); *accord Jones v. Indus. Comm'n*, 780 N.E.2d 697, 701 (Ill. Ct. App. 2002); *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 521 (Ky. 2003); *Williams v. Bet Const., Inc.*, 857 So. 2d 629, 632 n. 3 (La. Ct. App. 2003); *Busch v. Advanced Maintenance*, 659 N.W.2d 772, 776 (Minn. 2003); *Wiard v. Liberty Northwest Ins. Corp.*, 79 P.3d 281, 285 (Mont. 2003); *In re Boucher*, 808 A.2d 537, 540 (N.H. 2002); *Amos v. Spiro Pub. Schools*, 85 P.3d 813, 816 (Okla. 2004); *Montgomeryville Airport, Inc. v. Workmen's Comp. App. Bd.*, 541 A.2d 1187, 1189 (Pa. 1988); *Thomas v. Rhode Island Insurers' Insolvency Fund*, 814 A.2d 335, 338 (R.I. 2003); *Capital Motors, L.L.C. v. Schied*, 660 N.W.2d 242, 246 n. 3 (S.D. 2003); *In re Loberg*, 88 P.3d 1045, 1047 n. 1 (Wyo. 2004).

however, because a substantive law enacted *after* an injury but *before* a petition is filed is *not* retroactively applicable to workers' compensation claims:

> *In Cole v. Silverado an employer attempted to bind claimant's rights by a statute that became effective after the claim's filing. We held that statute uninvocable and the claimant's rights to be governed by the law in force at the time of the claim's filing. This was so because the amendment was enacted after the "proceeding was begun" and because it altered the claimant's substantive rights. Here the very same change that occurred* ***after the claim arose but before the claim's filing*** *would be binding in this case. We hold that the same result as in Cole must follow here. If we did not pronounce the amended statute uninvocable, the claim would stand subject to substantive law changes enacted after the injury. The right to compensation clearly vests at the time a worker is injured.*

Amos v. Spiro Publ. Sch., 85 P.3d 813, 816 (Okla. 2004) (italics and emphasis in original) (court considered whether amendment reducing limitations period from five to three years could be retroactively enforced).

Similarly, the Eighth Circuit Court of Appeals has interpreted this Court's *Landgraf* decision as rejecting any focus on the date of filing of the petition in analyzing retroactivity issues:

> The University argues that the application of § 108 in this case is not even arguably retroactive because Maitland filed his complaint after the effective date of the Act so that § 108 was the law at the time the lawsuit was initiated. We are not persuaded by the University's argument. The

> date of filing is irrelevant; the date of "the events in suit," *Landgraf v. USI Film Prods.*, 511 U.S. 244, ___, 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229 (1994), determines whether a court must consider a statute's potential retroactive effect.

Maitland v. University of Minnesota, 43 F.3d 357, 361 n. 3 (8th Cir. 1994).

In an analogous situation, the Iowa supreme court in *Thorp*, *supra*, determined that a statutory amendment enacted in 1986 could not be applied retroactively to a dram shop claim which accrued in 1985, even though the petition was not filed until 1987, *after* the effective date of the amendment in question; in fact, the retroactive application was found to violate due process. *Thorp*, 446 N.W.2d at 459-460. The Iowa supreme court has given no rationale for why the same principle should not also apply in the present claim.

There can be no dispute that Gardner's workers' compensation claim accrued and vested on the date of his injury in 1994. In fact, Heartland even paid a variety of statutory benefits (weekly healing period benefits and medical benefits) beginning shortly after the injury. It would be curious indeed to say that Heartland was paying workers' compensation benefits if Gardner had no right to receive them. Consequently, Gardner's claim had vested on the date of injury and cannot be divested by any subsequent amendment to the Iowa workers' compensation laws.

C. Due process analysis. Turning to the specific merits of the due process issue, the Iowa supreme court has already determined that a "claimant's interest in workers' compensation benefits is a property right which

cannot be taken away without due process of law." *Auxier v. Woodward State Hosp. Sch.*, 266 N.W.2d 139, 142 (Iowa 1978) (citing *Goldberg v. Kelley*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)). It must be noted that *Auxier* dealt with a deprivation of workers' compensation benefits *prior* to any petition being filed. *Id.* at 140-41. Consequently, the Iowa supreme court has held that an injured worker has a vested property right in statutory worker's compensation benefits beginning from the *date of injury*, and such rights are protected by principles of due process. *Id.*

The Iowa supreme court has also already determined that an amendment or repeal of a statutory cause of action cannot be applied retroactively to an accrued and vested legal claim without violating constitutional due process rights:

> In summary, the 1986 amendment that deprived plaintiff of her cause of action does not fall within those categories of curative or emergency legislation that involve an overriding public interest and which can constitutionally be applied retroactively. Neither do we believe that the legislation was merely a change in procedure or remedy. Rather, we believe that *plaintiff had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions. . . . Our state due process protections also are grounded on principles of justice and fairness which preclude legislative changes that disturb the vested rights of its citizens. Consequently, we agree that plaintiff's*

> *contentions are supported by both the federal and state constitutions.*

Thorp, 446 N.W.2d at 463 (emphasis added).

Other courts considering similar issues have also found that due process rights are implicated when the retroactive application of a statute deprives a party of a vested claim or defense to a claim. This Court itself has held that "a vested cause of action is property and is protected from arbitrary interference" and that due process requires "the preservation of [a party's] substantial right to redress by some effective procedure." *Gibbes v. Zimmerman*, 290 U.S. 326, 332, 54 S. Ct. 140, 142 (1933).

Similarly, the Vermont supreme court recently held that retroactive application of a medical malpractice statute of repose violated due process: "While the legislature may impose reasonable limitations on rights of action, due process does not permit the legislature to annul vested rights." *Lillicrap v. Martin*, 591 A.2d 41, 48 (Vt. 1989). The *Lillicrap* court noted that the plaintiff's rights vested on the date of injury and were protected by due process thereafter:

> Plaintiff's cause of action arose at the time of the defendant's claimed negligence, at which moment his cause acquired the status of a property right in the form of a "substantial right to redress by some effective procedure." *Gibbes v. Zimmerman*, 290 U.S. at 332, 54 S. Ct. at 142. Section 521 deprives plaintiff of due process because it forecloses all manner of redressing the violation of his vested rights.

Lillicrap, 591 A.2d at 49.

It appears most state courts have similarly determined that, once a cause of action vests, it is protected by constitutional guarantees of due process from retroactive application of subsequent amendments or changes in the substantive law. *See, e.g., Resolution Trust Corp. v. Fleischer*, 892 P.2d 497 (Kan. 1995) (holding that accrued causes of action are vested property rights, and further holding that "[s]ubstantive laws affecting vested rights cannot be made retroactive without violating due process."); *Pielech v. Massasoit Greyhound, Inc.*, 804 N.E.2d 894 (Mass. 2004) (retroactive application of amendment expanding cause of action in religious discrimination claims violated due process); *Randich v. Pirtano Constr. Co.*, 804 N.E.2d 581 (Ill. Ct. App. 2004) (post-injury statutory amendment retroactively removing tort immunity violated due process; court discusses numerous prior Illinois appellate cases with similar holdings); *Bourgeois v. Wiley*, 849 So. 2d 632 (La. 2003) (accrued causes of action were vested rights, and retroactive statute imposing further conditions for recovery on those claims violated due process); *cf. Karl v. Bryant Air Conditioning Co.*, 331 N.W.2d 456, 464-67 (Mich. 1982) (accrued causes of action are vested rights which cannot be abolished by subsequent statutes, and are protected by due process; court determined that comparative fault statute at issue was merely remedial and did not abolish claim, and thus could be applied retroactively).

Under Iowa law, Gardner had a vested property right in his workers' compensation claim which accrued on the date of his injury, and this property right is entitled to constitutional due process protection.

D. Subject matter jurisdiction vs. authority to grant relief. The Iowa supreme court appears to have

gone astray in its analysis by simply labeling Iowa Code § 85.71 to be a "subject matter jurisdiction" statute, and then mechanically holding that subject matter jurisdiction is merely "procedural" rather than "substantive." (App., pp. 1 n. 3; 4-13 & n. 3; 27-36 & n. 3). The Iowa supreme court reached this conclusion without any analysis, and in fact simply cited prior Iowa cases which also labeled the statute to be a "subject matter jurisdiction" statute without any analysis. (App., pp. 1 n. 3; 5 n. 3; 28 n. 3). Essentially, the Iowa supreme court begged the question of whether the amendment could be applied retroactively.

As noted previously, a vested claim cannot be divested by retroactive application of an amendment to or repeal of a statute, regardless of what "label" is applied to the statute. However, to the extent that the "subject matter jurisdiction" label does have relevance to this claim, the label does not apply.

"Subject matter jurisdiction refers to the power of a court 'to hear and determine cases of the general class to which the proceedings belong, not merely the particular case then occupying the court's attention.'" *State v. Mandocino*, 509 N.W.2d 481, 482 (Iowa 1993) (quoting *Christie v. Rolscreen Co.*, 448 N.W.2d 447 (Iowa 1989)). A court or administrative agency may have subject matter jurisdiction over a particular claim, but lack authority to hear the claim because of procedural defects (*e.g.*, lack of personal jurisdiction, venue) or lack authority to grant relief or damages on the merits (*e.g.*, statute of limitations, affirmative defenses):

> A statute . . . that creates a cause of action and establishes procedures for enforcing that action provides an excellent example of how a court may have subject matter jurisdiction, yet lack

> the authority to hear a particular case. Such a statute gives the district court subject matter jurisdiction over the type of action the statute creates. By following the statutory procedures a party properly invokes the authority of the court to hear the case. A party who ignores one or more of the procedures does not invoke such authority.

Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989) (holding that court had subject matter jurisdiction over discrimination claim, but lacked authority to hear the case because of plaintiffs' failure to follow statutory filing procedures).

Similarly, the Iowa supreme court endorsed the Fourth Circuit's analysis of this distinction:

> "While the question of the right of plaintiff to maintain the suit is frequently treated as going to the question of jurisdiction, it goes, in reality, to the right of plaintiff to relief, rather than to the jurisdiction of the court to afford it."

State v. Iowa Co-Operative Ass'n, 79 N.W.2d 775, 777 (Iowa 1956) (holding that district court had subject matter jurisdiction over a *quo warranto* proceeding regardless of whether plaintiffs had standing to bring claim or were entitled to the relief sought) (quoting *Greenwood County v. Duke Power Co.*, 81 F.2d 986 (4th Cir. 1936)). The Iowa supreme court went on to explicitly adopt this Court's analysis of the distinction:

> "There may be jurisdiction and yet an absence of merits *** as where *** the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. *Whether a plaintiff seeking such relief has the requisite standing is a question going to*

> *the merits, and its determination is an exercise of jurisdiction. . . . If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.*"

Iowa Co-Operative Ass'n, 79 N.W.2d at 777 (quoting *General Inv. Co. v. New York Cent. R. Co.*, 271 U.S. 228, 46 S. Ct. 496, 497, 70 L. Ed. 920 (1926) ("By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought.")) (emphasis added).

This Court has recently reaffirmed the analytical distinction between subject matter jurisdiction and authority to grant relief on the merits of the claim:

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case. See generally 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, p. 196, n. 8 and cases cited (2d ed.1990). As we stated in *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946), "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," *id.*, at 685, 66 S. Ct., at 777, unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a

> claim is wholly insubstantial and frivolous." *Id.*, at 682-683, 66 S. Ct., at 776; see also *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 285, 113 S. Ct. 753, 767-768, 122 L. Ed. 2d 34 (1993); *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25, 33 S. Ct. 410, 411-412, 57 L. Ed. 716 (1913). Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida,* 414 U.S. 661, 666, 94 S. Ct. 772, 777, 39 L. Ed. 2d 73 (1974); see also *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 359, 79 S. Ct. 468, 473, 3 L. Ed. 2d 368 (1959).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210, ___ (1998).

In the present case, Gardner has asserted a claim for benefits under the Iowa Workers' Compensation Act. The Iowa workers' compensation commissioner has been granted exclusive jurisdiction over all claims for benefits under that Act. Iowa Code §§ 85.20, 85.26(3). Consequently, the commissioner has subject matter jurisdiction over Gardner's claim – whether Gardner is entitled to benefits under the Act, and the extent of entitlement to those benefits, is within the sole authority of the commissioner to determine. Thus, the issue presented is *not* whether the commissioner had subject matter jurisdiction, but whether the 1997 amendment to Iowa Code § 85.71

can be applied retroactively to alter Gardner's entitlement to benefits under the Act.[10]

However, even if section 85.71 is construed to be a "jurisdictional" statute, the 1997 amendment still cannot be applied retroactively to extinguish Gardner's claim, because to do so would violate his substantive rights. This Court's general discussion of retroactivity in *Landgraf, supra*, had led some courts to conclude that there "was a presumption *in favor of* retroactivity for jurisdictional statutes." *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950, 117 S. Ct. 1871, 1878, 138 L. Ed. 2d 135, ___ (1997) (emphasis in original). This presumption was apparently shared by the Iowa supreme court, which determined that, as a "jurisdictional" statute, the 1997 amendment was to be applied retroactively to Gardner's claim. (App., pp. 4-13, 27-36).

This Court, however, has expressly disavowed any such broad endorsement of a general principle of retroactivity for jurisdictional statutes:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.

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[10] Similarly, if a worker, whose status as an employee or an independent contractor were in dispute, brought a claim for workers' compensation benefits, the commissioner would have subject matter jurisdiction over the claim, even if the commissioner subsequently determined that the worker was in fact an independent contractor who was not entitled to benefits under the Act. *See* Iowa Code §§ 85.1, 85.61(11)-(13) (defining workers covered and excluded by the Act).

> . . . Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Hughes Aircraft, 520 U.S. at 951, 117 S. Ct. at 1878, 138 L. Ed. 2d at ___ (citations omitted) (emphasis in original).

In the present case, the 1997 amendment, if jurisdictional, operates to destroy jurisdiction completely, rather than merely transfer jurisdiction to another court. Consequently, pursuant to *Hughes Aircraft*, the 1997 amendment directly affects Gardner's substantive rights, and is subject to a presumption against retroactivity. *Id.* As noted previously, where substantive rights are affected, a retroactive application of a statutory amendment is barred by due process. *Thorp*, 446 N.W.2d at 461; *Gibbes*, 290 U.S. at 332, 54 S. Ct. at 142.

E. Policy considerations. The Iowa supreme court seeks to "wash its hands" of any responsibility for depriving Gardner of his vested workers' compensation claim by suggesting that Gardner should have simply pursued a claim under Georgia law. (App., pp. 2-3; 20 n. 7). The court incorrectly states that Gardner was injured in 1996 (rather than his actual injury date in 1994), and implies that Gardner could have filed a timely claim in Georgia even after the 1997 amendments to section 85.71 were adopted. (*Id.*). There is simply no record evidence to

support this conclusion. Rather, by the time the Iowa amendment was enacted in 1997, any potential claim in Georgia was already time-barred. Ga. Code Ann. § 34-9-82(a) (one-year statute of limitations). Consequently, because Gardner has been deprived of any forum in which to seek benefits, the retroactive application of the 1997 amendment is an unconstitutional denial of due process. *See Morris v. Gross*, 572 S.W.2d 902, 906-07 (Tenn. 1978) (legislature's attempt to abolish administrative agency jurisdiction to hear medical malpractice claims violated due process by depriving pending litigants of any forum in which to pursue their vested claims).

Also, the Iowa supreme court fails to consider that the workers' compensation benefits to which Gardner is entitled under the Iowa act are different and greater than the benefits he could receive elsewhere. Under Georgia law, permanent disability benefits for a body as a whole injury are limited to 300 weeks. Ga. Code Ann. § 34-9-263. Under Iowa law, Gardner can receive up to 500 weeks of benefits for a body as a whole injury. Iowa Code § 85.34. In fact, Gardner was found to be entitled to 375 weeks of benefits in this case (*i.e.*, 75 more weeks than the maximum number of weeks Gardner could have received under Georgia law). (App., pp. 25, 69-74, 77). Under Georgia law, the maximum weekly compensation rate is significantly lower than Iowa's maximum rate. Ga. Code Ann. §§ 34-9-261 to -262; Iowa Code § 85.37. Clearly the Iowa supreme court is wrong to suggest that Gardner's substantive rights are not affected by its decision to retroactively apply the 1997 amendment to dismiss his claim. Not only does the 1997 amendment affect the type and extent of benefits, it also affects whether Gardner and other injured workers will receive *any* of the benefits to which they are entitled.

This raises another serious consequence of the Iowa supreme court's decision. If not corrected by this Court, the effects of the Iowa supreme court's erroneous decision will prejudice the rights not only of Gardner, but potentially scores, if not hundreds, of other out-of-state workers in similar situations. Under Iowa law, injured workers (including Gardner) have a right to receive medical benefits for life (*e.g.*, future surgery, ongoing prescription medications, hospital or nursing care for paralyzed or severely injured workers, etc.). Iowa Code §§ 85.26, 85.27. Workers (including Gardner) also have a right to file for review-reopening to seek additional permanent disability benefits within three years after last payment of weekly benefits. Iowa Code § 85.26(2). Workers receiving permanent total disability benefits receive weekly benefits for life, as do the survivors of workers killed on the job. Iowa Code §§ 85.34, 85.31. If this Court declines the opportunity to correct the Iowa supreme court's error, out-of-state workers will lose these vested rights; most of these workers are those who suffered the most severe injuries and who most need the statutory benefits to which they are entitled under Iowa law.[11]

An even more alarming possibility raised by the Iowa supreme court's decision is that the court's reasoning would permit the Iowa legislature to amend the workers' compensation laws to retroactively reduce or eliminate

[11] Many of these workers may never have filed a formal petition with the Iowa workers' compensation commissioner, either because benefits have been voluntarily paid, and/or because their statute of limitations has not yet run (because of Iowa's three-year "rolling" statute of limitations in Iowa Code § 85.26(1) and (2)).

benefits, effectively at will. The legislature could remove entire classes of workers (*e.g.*, part-time or seasonal workers, construction workers, etc.) from the protection of the statute, or could reduce, limit, or even revoke the amount or types of benefits available to injured workers. Further, these amendments could be applied to deprive benefits to any injured worker unfortunate enough not to have had his case settled or fully adjudicated by the date of enactment.

CONCLUSION

For the reasons set forth above, Gardner contends he had a vested right in his claim for Iowa workers' compensation benefits. The Iowa legislature's subsequent amendment cannot be applied retrospectively to abolish his claim, and the Iowa supreme court's contrary decision results in a deprivation of Gardner's constitutional rights of due process. Gardner respectfully requests this Court to grant this Petition for Writ of Certiorari, review the Iowa supreme court's decision, and reverse that decision, thereby restoring his workers' compensation benefits.

Respectfully submitted,

MICHAEL L. MOCK
BRADSHAW, FOWLER, PROCTOR
& FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
(515) 243-4191

App. 1

IN THE SUPREME COURT OF IOWA

No. 111/02-0993

ORDER

(Filed Feb. 27, 2004)

HEARTLAND EXPRESS,

Appellant,

vs.

JAMES GARDNER, JR.,

Appellee.

After consideration by the court, Wiggins, J., taking no part, appellee's petition for rehearing in the above-captioned case is hereby denied excepting that the following language is hereby changed in the opinion filed December 17, 2003, as follows:

1. On page 6, footnote 3, line 9, the following new material is added:

> *; accord Henriksen v. Younglove Constr.,* 540 N.W.2d 254, 256-61 (Iowa 1995); *George H. Wentz, Inc. v. Sabasta,* 337 N.W.2d 495, 498 (Iowa 1983); *Iowa Beef Processors, Inc. v. Miller,* 312 N.W.2d 530, 532-34 (Iowa 1981); *Christian v. Hirschbach Motor Lines, Inc.*, 496 N.W.2d 270, 273-74 (Iowa Ct. App. 1992); *see also Ex Parte Fluor Contractors Int'l,* 772 So. 2d 1157, 1159-60 (Ala. 2000) (considering the effect of the state's extraterritorial injury statute on subject matter jurisdiction); *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106, 107-09 (Ala. Civ. App. 1995) (same); *Patton v. Indus. Comm'n,* 498 N.E.2d 539, 544 (Ill. App. Ct. 1986) (same); *Haney v. Butler,* 990 S.W.2d 611, 616-18 (Ky.

1999) (same); *Miller v. S.W. Rodgers,* 634 So. 2d 1377, 1377-78 (La. Ct. App. 1994) (same); *Cherokee Lines, Inc. v. Bailey,* 859 P.2d 1106, 1110-11 (Okla. 1993) (same); *Matthews v. St. Paul Prop. & Liab. Ins.,* 845 S.W.2d 737, 738-39 (Tenn. 1992) (same). *See generally* 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* ch. 143 (2002) [hereinafter Larson] (discussing various jurisdictional and conflict of laws questions related to the application of state workers' compensation statutes for both in-state and extraterritorial injuries).

2. On page 8, lines 17, 18, 22, and 32, the capitalizations of the word "state" is corrected:

or another state when (1) his employer has a place of business in this or such other state and he regularly works [sic] employer in this or such other state[.]

employer in this or such other state." Model Act § 7(d)(4).

3. On page 15, footnote 4, the citation to *Larson's Workers' Compensation Law* is corrected as follows:

The discussion on this point at 9 Larson § 143.04[2][c], at 143-24 to -25 is particularly informative:

4. On page 16, footnote 5, line 2, the short cite to *Larson's* is corrected as follows:

compensation theory. *See* 9 Larson § 143.03[1]. We make no comment on what, if any,

5. On page 19, line 16, a new footnote 7 is added:

Although Gardner's claim was wrongly filed in Iowa, it appears his claim could have been brought in Georgia.

Richard C. Kissiah, *Georgia Workers' Compensation Law* § 2.02, at 97 (2d ed. 2002) ('Georgia has long recognized that there is Georgia workers' compensation jurisdiction with regard to any injury that occurs within the territorial limits of Georgia." This jurisdiction "exists even if the injured employee was not a Georgia resident and even if the contract of employment was not made in Georgia. . . . " (Footnotes omitted.)). The apparent viability of a claim in Georgia reveals that our determination in this case that Gardner's claim was not viable in Iowa does not cause the wholesale elimination of all of his substantive rights related to a claim for his 1996 injury, subject, of course, to any applicable statute of limitations that may have run while Gardner pursued his claim in Iowa. In actuality, the only alleged right affected by our disposition is Gardner's "right" to bring a claim for benefits *in Iowa*. Of course, our workers' compensation statute is replete with provisions that tailor a claimant's right to recover Iowa workers' compensation benefits.

A copy of the corrected pages are attached to this order.

Dated this 27th day of February, 2004.

THE SUPREME COURT OF IOWA

By /s/ Mark S. Cady
Mark S. Cady, Justice

Copies to:

Stephen W. Spencer
Peddicord, Wharton, Spencer & Hook, P.C.
405 Sixth Avenue
Des Moines, Building, Suite 700
Des Moines, IA 50309

D. Brian Scieszinski
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309

Honorable Douglas F. Staskal
Polk County Courthouse
500 Mulberry Street
Des Moines, IA 50309-4238

Iowa State Bar Association
521 E. Locust
Des Moines, IA 50309

West Publishing Co.
P.O. Box 64526
St. Paul, MN 55164

Source Acquisition
Lexis-Nexis
8891 Gander Creek Dr.
P.O. Box 8809
Dayton, OH 45401

III. Subject Matter Jurisdiction and Extraterritorial Injuries.

1. Background and Underlying Principles.

Subject matter jurisdiction "'is the power to hear and determine cases of the general class to which the proceedings belong.'" *Shirley v. Pothast,* 508 N.W.2d 712, 714 (Iowa 1993) (citation omitted). Through its adoption of Iowa Code chapter 85, "the legislature removed from the district court's general, original jurisdiction, the power to hear claims involving the 'rights and remedies of an injured employee against an employer for industrial injuries' and placed them within the exclusive jurisdictional purview of

the [commissioner]." *Id.* at 715 (citation omitted). Thus, subject matter jurisdiction over workers' compensation claims is vested in the commissioner subject to any further circumscription by the legislature. *See id.* at 714-15.

One example of such circumscription is Iowa Code section 85.71, which "governs the [commissioner's] subject matter jurisdiction over workers' compensation claims based on injuries sustained outside the state."[3] *Heartland*

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[3] Gardner argues that Iowa Code section 85.71 relates to the authority of the workers' compensation commissioner over a matter at hand rather than to its subject matter jurisdiction. We have wrestled with applying our definitions and rules pertaining to these two concepts in many other contexts. *See State v. Emery*, 636 N.W.2d 116, 119-20 (Iowa 2001); *In re Marriage of Engler*, 532 N.W.2d 747, 748-49 (Iowa 1995); *State v. Mandicino*, 509 N.W.2d 481, 482-83 (Iowa 1993). However, section 85.71 has previously been interpreted to be a subject matter jurisdiction statute, and we find no reason to diverge from that determination. *Heartland Express, Inc.*, 631 N.W.2d at 265 ("Iowa Code section 85.71 is a subject matter jurisdiction statute."); *accord Henriksen v. Younglove Constr.*, 540 N.W.2d 254, 256-61 (Iowa 1995); *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495, 498 (Iowa 1983); *Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 532-34 (Iowa 1981); *Christian v. Hirschbach Motor Lines, Inc.*, 496 N.W.2d 270, 273-74 (Iowa Ct. App. 1992); *see also Ex Parte Fluor Contractors Int'l*, 772 So. 2d 1157, 1159-60 (Ala. 2000) (considering the effect of the state's extraterritorial injury statute on subject matter jurisdiction); *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106, 107-09 (Ala. Civ. App. 1995) (same); *Patton v. Indus. Comm'n*, 498 N.E.2d 539, 544 (Ill. App. Ct. 1986) (same); *Haney v. Butler*, 990 S.W.2d 611, 616-18 (Ky. 1999) (same); *Miller v. S.W. Rodgers*, 634 So. 2d 1377, 1377-78 (La. Ct. App. 1994) (same); *Cherokee Lines, Inc. v. Bailey*, 859 P.2d 1106, 1110-11 (Okla. 1993) (same); *Matthews v. St. Paul Prop. & Liab. Ins.*, 845 S.W.2d 737, 738-39 (Tenn. 1992) (same). *See generally* 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* ch. 143 (2002) [hereinafter Larson] (discussing various jurisdictional and conflict of laws questions related to the application of state workers' compensation statutes for both in-state and extraterritorial injuries).

Express, Inc. v. Terry, 631 N.W.2d 260, 265 (Iowa 2001); *see also George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495, 500 (Iowa 1983) ("The purpose of Iowa Code section 85.71 is to identify those employees who are entitled to benefits under the Iowa act despite occurrence of an injury out of state."). Prior to the adoption of section 85.71, workers' compensation claimants who had been hired in Iowa could file for benefits in Iowa even if they were injured outside of Iowa. *See* Harry W. Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations*, 24 Drake L. Rev. 336, 351-52 (1975) (citing *Haverly v. Union Constr. Co.*, 236 Iowa 278, 284-90, 18 N.W.2d 629, 633-36 (1945)). However, while Iowa jurisdiction could be invoked based on the sole factor of hiring, many other states' laws were more restrictive in extending jurisdiction over a claimant's claim for benefits arising from an "extraterritorial" injury. *See* The Council of State Governments, *Workmen's Compensation & Rehabilitation Law* § 7 cmt. at 97-98 (1973) [hereinafter Model Act]. For this reason, some workers' compensation claimants injured outside of the territorial limits of their "home" state found themselves unable to bring a claim for benefits in any state. *See id.*

This inequitable result moved the National Commission on State Workmen's Compensation Laws to recommend "that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired." *The Report of the Nat'l Comm'n on State Workmen's Compensation Laws* R2.11, at 48 (1972). Not long after this recommendation was made, the Council of State Governments proposed a model workers' compensation statutory provision "to ensure that [the] tragedy of complete failure of

coverage cannot possibly take place." Model Act § 7 cmt. at 98. This provision provided for extraterritorial jurisdiction as long as one of four jurisdictional prerequisites was satisfied:

> [A]n employee suffering an out-of-state injury may recover under this act if his employment is principally localized in this state, *or* he is working under a contract for hire made in this state in employment not principally localized in any state *or* he is working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law is not applicable to his employer *or* he is working under a contract of hire made in this state for employment outside the United States or Canada.

Id.

Although Iowa jurisdiction previously had been interpreted broadly, our legislature chose to add the Council of State Governments' model language in 1973. 1973 Iowa Acts ch. 144, § 29; *see also George H. Wentz, Inc.*, 337 N.W.2d at 500 ("Iowa Code section 85.71 is based on language found in section 7 of the [Model Act]."). In doing so, the legislature incorporated only a portion of the Model Act's definition of the term "principally localized." *See* 1973 Iowa Acts ch. 144, § 29. The Model Act definition of "principally localized" provided:

> A person's employment is principally localized in this or another state when (1) his employer has a place of business in this or such other state and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends

> a substantial part of his working time in the service of his employer in this or such other state[.]

Model Act § 7(d)(4). The legislature defined "principally localized" as requiring that "[the employee's] employer has a place of business in this or some other state and [the employee] regularly works in this state, or if [the employee] is domiciled in this state." 1973 Iowa Acts ch. 144, § 29. Importantly, the legislature chose not to include in this definition the further model language under the second (domicile) clause that permitted an employee to establish principal localization – and thus jurisdiction – if he could show he was domiciled in the state *and* spent "a substantial part of his working time in the service of his employer in this or such other state." Model Act § 7(d)(4).

The main controversy in this appeal arises as a result of a 1997 amendment to section 85.71. *See* 1997 Iowa Acts ch. 106, § 1. This amendment came shortly after our decision in *Henriksen v. Younglove Construction,* 540 N.W.2d 254 (Iowa 1995). In *Henriksen,* we reconsidered our prior interpretations of section 85.71(1), in which we had determined that that subsection required "a meaningful relationship between the employee's domicile in Iowa and the employment relationship" to establish subject matter jurisdiction in Iowa. *Id.* at 258; *see also George H. Wentz, Inc.,* 337 N.W.2d at 500-02; *Iowa Beef Processors, Inc. v. Miller,* 312 N.W.2d 530, 533-34 (Iowa 1981). After looking to the plain language of the statute and noting the legislature's failure to include the Model Act language requiring a more extensive relationship, we concluded, "[s]ection 85.71 on its face clearly permits domicile as an independent basis for subject matter jurisdiction." *Henriksen,* 540 N.W.2d at 258.

Not long after this decision, the legislature amended section 85.71:

> Section 1. Section 85.71, Code 1997, is amended to read as follows:
>
> 85.71 ~~EMPLOYMENT~~ *INJURY* OUTSIDE OF STATE.
>
> If any employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee . . . would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee . . . shall be entitled to the benefits provided by this chapter, ~~provided that~~ *if* at the time of such injury *any of the following is applicable:*
>
> 1. The employment is principally localized in this state, that is, the employee's employer has a place of business in this or some other state and the employee regularly works in this state, or if *the employee's employer has a place of business in this state and* the employee is domiciled in this state ~~, or~~.
>
> 2. The employee is working under a contract of hire made in this state in employment not principally localized in any state~~, or~~ *and the employee spends a substantial part of the employee's working time working for the employer in this state.*
>
> 3. The employee is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to the employee's employer~~, or~~.

> 4. The employee is working under a contract of hire made in this state for employment outside the United States. . . .
>
> Approved May 2, 1997 [(effective July 1, 1997)]

1997 Iowa Acts ch. 106, § 1; *see also* Iowa Code § 3.7(1) (1999) (providing the effective date for legislation that does not otherwise specify an effective date). Although this amendment had clear ramifications for the application of subsection (1), the legislature's addition of language to subsection (2) also substantially altered the required prerequisites for subject matter jurisdiction under that subsection. In fact, it is the effect of the amendment to subsection (2) that is directly at issue in this case.

Gardner characterizes the main controversy in this appeal as involving a question of retroactive application of Iowa Code section 85.71(2). He argues that the pre-amendment form of section 85.71(2) applies to his claim for workers' compensation benefits given it was in effect at the time he was injured in 1994. As a corollary to this argument, Gardner asserts that the commissioner properly found that it had subject matter jurisdiction over his claim under subsection (2) of the statute because his contract for hire was made in Iowa and his employment was "not principally localized in any state." *See* Iowa Code § 85.71(2) (1993).

Heartland contends that the post-amendment form of section 85.71(2) applies because the amendment should be applied prospectively, not retrospectively. *See* Iowa Code § 85.71(2) (1999). It further argues that Gardner seeks to create a question of retroactive applicability where none exists. Instead, Heartland points to the timing of the filing of Gardner's petition for Iowa workers' compensation

benefits, which, it points out, came over eighteen months *after* the statutory amendment became effective. Based on this timing, Heartland argues the post-amendment statute applies due to the fundamental prerequisite that subject matter jurisdiction exist before a tribunal takes any action in a particular case.

Ultimately, the claims asserted by the parties require us to consider two interrelated issues pertaining to the commissioner's subject matter jurisdiction. First, we must decide which version of section 85.71(2) applies to Gardner's cause of action: the pre-amendment version that existed at the time of his injury or the post-amendment version that existed at the time his petition for workers' compensation benefits was filed. Second, we must determine whether Gardner's claim for benefits falls within the commissioner's jurisdiction under the appropriate version of section 85.71(2).

2. Which Version of Section 85.71(2) Applies?

Several fundamental principles related to subject matter jurisdiction guide our determination of the first issue. We launch from the premise that "jurisdiction [must] be established as a threshold matter," a requirement that "'spring[s] from the nature and limits of the judicial power' . . . and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210, 227 (1998). For this reason, a court without subject matter jurisdiction over a particular area "'cannot proceed at all in any cause.'" *Id.* at 94, 118 S. Ct. at 1012, 140 L. Ed. 2d at 227 (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264, 265 (1869)). The fundamental nature of subject

matter jurisdiction makes the issue "an abstract inquiry *unrelated and precedent to* the rights of the parties to a particular case." *In re Guardianship of Matejski,* 419 N.W.2d 576, 579 (Iowa 1988) (emphasis added).

Courts have long recognized that "'the jurisdiction of the [c]ourt depends upon the state of things at the time of the action brought.'" *Keene Corp. v. United States,* 508 U.S. 200, 207, 113 S. Ct. 2035, 2040, 124 L. Ed. 2d 118, 127-28 (1993) (collecting cases and quoting *Mollan v. Torrance,* 22 U.S. (9 Wheat.) 537, 539, 6 L. Ed. 154, 155 (1824)); *Powell v. Khodari-Intergreen Co.,* 303 N.W.2d 171, 172 (Iowa 1981); *see also Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry.,* 270 U.S. 580, 586, 46 S. Ct. 402, 405, 70 L. Ed. 743, 746 (1926); *Anderson v. Watt,* 138 U.S. 694, 702-03, 11 S. Ct. 449, 451, 34 L. Ed. 1078, 1081 (1891); *Secrest v. Simonet,* 708 P.2d 803, 807 (Colo. 1985); *Davis v. Davis,* 799 S.W.2d 127, 131 (Mo. Ct. App. 1990); *Travelers Indem. Co. v. Montelongo,* 785 S.W.2d 436, 438 (Texas Ct. App. 1990). Although this principle is often applied in light of the parties' status – most often in light of their domicile or a change in that domicile – this "state of things" also includes and requires an application of the jurisdictional law *at the time the suit is filed. See In re Lewis,* 45 B.R. 27, 30 (Bankr. W.D. Mo. 1984); *In re Quinn,* 44 B.R. 622, 625 (Bankr. W.D. Mo. 1984); *Guy v. Am. Fed'n of Gov't Employees,* No. 71 (No. 2501), 1987 WL 5168, at *5 (Tenn. Ct. App. Jan. 9, 1987). Ultimately, because subject matter jurisdiction goes to the core of the judicial power, it must exist in light of the law pertaining to subject matter jurisdiction at the time that judicial power is exercised. *See Steel Co.,* 523 U.S. at 94, 118 S. Ct. at 1012, 140 L. Ed. 2d at 227.

Gardner contends the commissioner correctly invoked the subject matter jurisdiction statute in place at the time of his injury. Yet, at the time of his injury, the commissioner had not been asked to exercise its judicial authority. Only at the time he filed his claim – which was after the amendment to section 85.71(2) – was the commissioner called upon to exercise its authority. It was at that point that the commissioner was required to look inward to determine whether subject matter jurisdiction existed under the law related to its jurisdiction as it stood at that time. *See Bailey v. Batchelder,* 576 N.W.2d 334, 337-38 (Iowa 1998). When the commissioner did otherwise – looking back and assuming jurisdiction based on 1994 law – it focused on the parties' status predominantly to determine whether it conferred jurisdiction. Yet, jurisdiction cannot be conferred based on the parties' status alone; it is a statutory and constitutional inquiry. *See Smith v. Smith,* 646 N.W.2d 412, 414-15 (Iowa 2002); *see also Matejski,* 419 N.W.2d at 579. The commissioner's subject matter jurisdiction must be considered in light of the law at the time the suit was filed, which included the amendment to section 85.71(2).

3. Applying the Post-Amendment Version of Section 85.71(2).

We must next determine whether Gardner "[was] working under a contract of hire made in this state in employment not principally localized in any state" *and* spent "a substantial part of [his] working time working for the employer in this state." Iowa Code § 85.71(2) (emphasis added). Both parties seemingly concede that Gardner "work[ed] under a contract of hire made" in Iowa and his employment was "not principally localized in any state."

Id. Presumably, the latter fact is established by evidence that Gardner's actual transportation work for Heartland took him to approximately forty states and he spent no more or less time in any one state. Heartland uses this evidence to argue that because Gardner spent only 2.5% of his working time in Iowa he did not spend "a substantial part of [his] working time working for the employer in this state." *Id.* It believes that *in proportion to* his total work time, Gardner's time in Iowa was not substantial. Gardner contends that his working time in Iowa was substantial in light of the fact that his work was evenly spread throughout forty states and was not any more substantial in any one place. He believes that *in relation to* his total work time, his time in Iowa was substantial.

Iowa Code section 85.71 does not include a definition of the term "substantial." *See id.* § 85.71. In the absence of a legislatively provided definition, we must employ our normal tools of statutory interpretation to define the term and interpret the statute. *See Swanson,* 668 N.W.2d at 574-75. As we undertake this analysis, it is important to note that the issue of what is meant by "a substantial part of the employee's working time working for the employer in this state" is substantially clouded by the statute's current structure. Iowa Code § 85.71(2); *see also id.* § 85.71.

In *Henriksen,* we noted that the legislature had not included additional definitional language from the Model Act under the second (domicile) clause of Iowa Code section 85.71(1). 540 N.W.2d at 257. This language encompassed the "requirement that the employee 'spends a substantial part of his working time in the service of his employer in this or such other state'" in addition to being domiciled in the state. *Id.* (citation omitted). When amending

section 85.71, the legislature chose to add the "substantial part" language to the statute but placed it in subsection (2) rather than with the second (domicile) clause of subsection (1). *See* 1997 Iowa Acts ch. 106, § 1. This has created a statute that is arguably contradictory and clearly different from other state statutes pertaining to extraterritorial jurisdiction. This has the further effect of making it difficult to find prior decisions of other courts dealing with the precise "substantial part" question raised in this appeal. *See Swanson,* 668 N.W.2d at 574-75.

Iowa Code section 85.71(2) requires that a contract for hire be made in Iowa for employment not principally localized in any state *and* that the employee spend "a substantial part of [his] working time working for the employer" in Iowa. Iowa Code § 85.71(2). Both the Model Act and other state statutes require that only the first and second of these requirements be met. *See* Model Act §§ 7(a)(2), (d)(4); *see also* Ala. Code § 25-5-35(d)(2) (2000); Ky. Rev. Stat. Ann. § 342.670(1)(b) (Michie 1997); N.M Stat. Ann. § 52-1-64(B) (Michie 2003); 77 Pa. Cons. Stat. Ann. § 411.2(a)(2) (West 2002). The Model Act approach permits a worker who has "transitory employment" – such as a truck driver – to establish jurisdiction within the state in which his contract was created so long as his employment has not subsequently focused on another state ("principally localized") so as to trump the state of contracting's public policy interest in supervising contracts formed within its borders. *See* 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 143.04[2][c],

at 143-24 to -25 (2003) [hereinafter Larson].[4] Moreover, this approach is consistent with traditional applications of various principles related to contract formation and workers' compensation law. *See id.* § 143.03[1]. In fact, this was essentially the status of Iowa law before section 85.71 was enacted by the legislature in 1973. *See* Dahl, 24 Drake L. Rev. at 351-52.

However, under Iowa's current section 85.71(2), the legislature has added an additional hurdle that the employee also show he "spends a substantial part of [his] working time working for the employer" in Iowa. The effect of this language is to require an employee seeking to invoke jurisdiction under section 85.71(2) to show that he does not have significant contact with any state while also showing he spends a substantial amount of time in Iowa. This seemingly contradictory result runs contrary to the intent behind the Model Act, which was meant to provide

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[4] The discussion on this point at 9 Larson § 143.04[2][c], at 143-24 to -25 is particularly informative:

> In some kinds of employment, like trucking . . . the employee may be constantly coming and going without spending any longer sustained periods in the local state than anywhere else; but a status rooted in the local state by the original creation of the employment relation there, is not lost merely on the strength of the relative amount of time spent in the local state as against foreign states. An employee loses this status only when his or her regular employment becomes centralized and fixed so clearly in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen so long as the employee's presence in any state, even including the original state, is by the nature of the employment brief and transitory.

for eased establishment of jurisdiction by a transitory employee like Gardner.[5] *See* Model Act § 7 cmt. at 97-98. Instead of the state simply maintaining its public policy interest in the contract formed within its borders and losing that interest only in light of another state with a higher interest – the state where employment is principally localized – section 85.71(2) may actually make it more difficult for the state to uphold its interest in supervising Iowa contracts. *See* Larson § 143.04[2][c]. In fact, in this case at least, we feel constrained to find that this is just what has happened.

As noted, other states utilizing the "substantial part" language have done so in conformance with the Model Act definition of "principally localized." This definition has been interpreted as requiring an analysis of whether an employee is domiciled and spending "a substantial part of his working time" working in the state only after the first method of determining principal localization – which considers the location of the employer's place of business and the employee's relationship to that location – has failed. Model Act § 7(d)(4); *see also Cowger v. Indus. Comm'n*, 728 N.E.2d 789, 795 (Ill. App. Ct. 2000); *Davis v. Wilson*, 619 S.W.2d 709, 711 (Ky. Ct. App. 1980); *Todacheene v. G & S Masonry*, 863 P.2d 1099, 1102 (N.M. Ct. App. 1993); *Lambie v. Workers' Comp. Appeal Bd.*, 736 A.2d 67, 69-70 (Pa. Commw. Ct. 1999). Nevertheless, some courts have had the opportunity to determine what constitutes a

[5] This result also bucks traditional applications of contract and workers' compensation theory. *See* 9 Larson § 143.03[1]. We make no comment on what, if any, constitutional issues might also arise from the application of section 85.71(2) in its current form.

"substantial part" within the confines of their respective states' extraterritorial jurisdiction statute. *See Ex parte Tri-State Motor Transit Co.*, 541 So. 2d 557, 558-59 (Ala. Civ. App. 1989); *Seales by Seales v. Daniel Constr. Co.*, 469 So. 2d 629, 630-31 (Ala. Civ. App. 1985), *overruled in part by Ex parte Robinson*, 598 So.2d 901, 904 (Ala. 1991); *Cowger*, 728 N.E.2d at 796; *Davis*, 619 S.W.2d at 711; *Todacheene*, 863 P.2d at 1105-06; *Lambie*, 736 A.2d at 70; *Hiller v. Workmen's Comp. Appeal Bd.*, 569 A.2d 1024, 1028 (Pa. Commw. Ct. 1990); *Robbins v. Workmen's Comp. Appeal Bd.*, 496 A.2d 1349, 1352 (Pa. Commw. Ct. 1985). No jurisdiction has adopted the relative approach advanced by Gardner for determining whether his employment was substantial. Instead, each of the other jurisdictions has simply looked at the whole picture of a claimant's employment to see what proportion of that employment time was spent working in their state.[6]

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[6] Some courts have taken a particularly holistic approach to determining what constitutes "a substantial part of the employee's working time working in [the] state" that examines an employee's employment relationship to an employer in the past, present, and future (as if no injury had occurred) to determine whether a "substantial" part may be established. Iowa Code § 85.71(2); *see also Seales by Seales v. Daniel Constr. Co.*, 469 So. 2d 629, 630-31 (Ala. Civ. App. 1985), *overruled in part by Ex parte Robinson*, 598 So.2d 901, 904 (Ala. 1991); *Todacheene v. G & S Masonry*, 863 P.2d 1099, 1105-06 (N.M. Ct. App. 1993). These jurisdictions seemingly contemplate the inclusion of some normal administrative operations (receiving orders, filing paperwork, etc.) in this calculation. *See Seales by Seales*, 469 So. 2d at 630-31; *Todacheene*, 863 P.2d at 1105-06. While this is an intriguing – albeit little accepted – approach, we are not inclined to adopt it in light of our statute's requirement that an employee spend "a substantial part of [his] *working time working . . . in* the state." Iowa Code § 85.71(2) (emphasis added). Gardner's initial and occasional interaction with Heartland in Iowa involved administrative activities preliminary to his work providing driving and delivery services for the transport of goods

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Significantly, none have found an amount of working time so low as 2.5% to constitute "a substantial part of the employee's working time working for the employer in [the] state." Iowa Code § 85.71(2); *see also Tri-State Transit Motor Co.,* 541 So.2d at 559 (employees' time in state not substantial); *Seales by Seales,* 469 So. 2d at 630-31 (approximately 53% of time spent in state not substantial); *Cowger,* 728 N.E.2d at 796 (infrequent in-state layovers while waiting for work assignments not substantial); *Davis,* 619 S.W.2d at 711 (20% of time spent in state is substantial); *Todacheene,* 863 P.2d at 1106 (prior year of working in state before out-of-state accident is substantial); *Lambie,* 736 A.2d at 70 (two days a week not substantial); *Robbins,* 496 A.2d at 1352 (delivery of fourteen of thirty-seven loads and other driving time substantial).

Moreover, despite the extensive and convoluted background and evolution of section 85.71(2), the mere fact it was amended by the legislature exhibits some measure of legislative intent. Clearly, the legislature intended to effect a change in the law when it amended subsection (2). The alteration it chose indicates its belief that jurisdiction under subsection (2) should be established by something more than the limited employment-related contact a transitory employee would have with a state in which his employment is not principally localized.

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or was limited to communication of work assignments and exchanges of paper work. While clearly related to his work, none of these activities significantly increased his *working* time in Iowa. *See id.* Moreover, other subsections of the statute – particularly subsection (1) – appear to already contemplate the role of such administrative activities by considering jurisdiction based on an employer's "place of business." *See id.* § 85.71(1).

In fact, if the legislature had not amended section 85.71(2), jurisdiction *may* have been established based in part on the same key evidence that Gardner does not work more than 2.5% in any one place that he here asserts as evidence that he actually spends "a substantial part of [his] working time working for [the] employer in" Iowa. Iowa Code § 85.71(2). The legislature clearly intended to up the jurisdictional ante by departing from prior law granting jurisdiction based on an employee's contract for hire and limited contact with the state to now require that an employee also spend "a substantial part of the employee's working time working for [the] employer in" Iowa. *Id.*

Ultimately, Gardner simply did not spend "a substantial part of [his] working time working" for Heartland in Iowa. *Id.* For this reason, the statutory prerequisites for the exercise of subject matter jurisdiction over his claim by an Iowa judicial body were not established. *See id.* Gardner's claim was wrongly filed in Iowa.[7] Therefore, we now

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[7] Although Gardner's claim was wrongly filed in Iowa, it appears his claim could have been brought in Georgia. Richard C. Kissiah, *Georgia Workers' Compensation Law* § 2.02, at 97 (2d ed. 2002) ("Georgia has long recognized that there is Georgia workers' compensation jurisdiction with regard to any injury that occurs within the territorial limits of Georgia." This jurisdiction "exists even if the injured employee was not a Georgia resident and even if the contract of employment was not made in Georgia. . . ." (Footnotes omitted.)). The apparent viability of a claim in Georgia reveals that our determination in this case that Gardner's claim was not viable in Iowa does not cause the wholesale elimination of all of his substantive rights related to a claim for his 1996 injury, subject, of course, to any applicable statute of limitations that may have run while Gardner pursued his claim in Iowa. In actuality, the only alleged right affected by our disposition is Gardner's "right" to bring a claim for benefits *in Iowa*. Of course, our

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exercise the duty of any court upon finding that it does not have subject matter jurisdiction and dismiss this action for want of that jurisdiction. *See Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012, 140 L. Ed. 2d at 227; *Bailey*, 576 N.W.2d at 337-338.

The result we reach in this case is done with some disinclination. However, while the legislative standard challenged in this case would appear to be capable of being satisfied only in rare circumstances, we cannot say the standard enacted is absurd or ineffectual. Ultimately, we are bound by the separate and distinct roles of our three branches of government and our fundamental and essential respect for the law-making function of the legislative branch. It is outside the role of the judicial branch to intrude into this function. Our respect for this venerable and important principle is greater than any particular unfair result we may perceive in a particular case. If our legislature finds, upon consideration of this case, that the statute at issue indeed functions in a manner that was not anticipated, it can, and, we trust, will, change it to give it different meaning.

REVERSED AND DISMISSED.

All justices concur except Wiggins, J., who takes no part.

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workers' compensation statute is replete with provisions that tailor a claimant's right to recover Iowa workers' compensation benefits.

IN THE SUPREME COURT OF IOWA

No. 111/02-0993

Filed December 17, 2003

HEARTLAND EXPRESS,

Appellant,

vs.

JAMES GARDNER, JR.,

Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Self-insured employer appeals from a district court ruling affirming a workers' compensation commissioner decision to award employee benefits, challenging the commissioner's subject matter jurisdiction. **REVERSED AND DISMISSED.**

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Spencer & Hook, P.C., Des Moines, for appellant.

D. Brian Scieszinski of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

CADY, Justice.

In this appeal, we must decide whether the workers' compensation commissioner had subject matter jurisdiction over an employee's claim for benefits. If the commissioner had jurisdiction over the claim, we must further consider whether a new hearing date should have been granted and whether the commissioner's determination as to the employee's industrial disability was supported by

substantial evidence. Ultimately, we do not reach these latter issues because we find the first issue – relating to subject matter jurisdiction – dispositive.

I. Background Facts and Proceedings.

James Gardner (Gardner), a Georgia resident, was an over-the-road truck driver for Heartland Express, Inc., (Heartland), an Iowa corporation. Gardner's employment included leasing his tractor and providing driving and delivery services to Heartland for the transport of goods. Gardner entered into a contractual relationship with Heartland in Coralville, Iowa, where Heartland maintains its corporate offices.[1] His pre-employment physical, new employee orientation, and initial equipment inspections each occurred in Iowa. During his employment with Heartland, Gardner was largely managed from Iowa. He received his work assignments and paychecks from the Iowa offices, and any other paperwork related to his employment was apparently sent to or from Iowa. However, Gardner's actual transportation work for Heartland took him to approximately forty states – including Georgia and Iowa – and he spent no more or less time in any one state.

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[1] There is no additional evidence related to the location at which Gardner entered into his contract for hire. Moreover, the parties do not dispute that the contract for hire was entered into in Iowa. *See Heartland Express, Inc. v. Terry,* 631 N.W.2d 260, 265-66, 270-71 (Iowa 2001) (avoiding the same core jurisdictional question raised in this appeal based on the determination that the employee's contract for hire was not entered into in Iowa).

On February 16, 1994, Gardner sustained an injury to his back while attempting to adjust a pin in one of the axle areas of his tractor-trailer at a delivery location in Georgia. Gardner completed his route and then notified Heartland of the injury. He was eventually referred to an occupational medicine specialist, Domenic Esposito, M.D. Dr. Esposito diagnosed Gardner's injury as a "large ruptured disc" in his spine. He recommended Gardner undergo a specific corrective surgery.

Gardner requested and received permission from Heartland to get a second opinion from another physician, Alfred Bonati, M.D. Dr. Bonati recommended a different surgery that he believed would hasten Gardner's healing time. He performed two surgeries on Gardner's back in July 1994. After the surgeries, Gardner began experiencing lower extremity pain, which he had not experienced before.[2] The combined effect of his back injury, back surgery, and lower extremity pain kept Gardner from returning to work. He was soon forced to sell his tractor due to his inability to make payments on it.

Sometime during this period, Heartland transferred Gardner's care to another physician, Charles Wingo, M.D. Dr. Wingo suggested further surgery, and yet another physician, Gary Lowery, M.D., confirmed his diagnosis. Dr.

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[2] Heartland later referred Gardner's medical case file to another physician, Gerald Smolensky, M.D., for an evaluation of whether a cause of action might exist against Dr. Bonati based on his treatment of Gardner. Dr. Smolensky opined that the surgery conducted by Dr. Bonati may have been inappropriate but the treatment was not negligent or below the standard of care. He also believed that Gardner likely would have benefited from the surgery suggested by Dr. Esposito.

Lowery performed two more surgeries on Gardner's back. On December 11, 1996, it was determined that Gardner had reached his maximum medical improvement. Except for limited employment at his father's convenience store, Gardner had not worked for almost three years.

In July 1997, Gardner underwent a functional capacity evaluation to determine whether he would be able to return to work full time. Although the evaluation revealed that Gardner could work up to eight hours a day and was "highly motivated to return to work," it also indicated that he might be unable to meet all of the physical requirements of the truck driving profession. Not surprisingly, when Gardner attempted to return to trucking full time, he was prevented from doing so by his inability to sit comfortably for long periods of time or lift heavy objects. He held several trucking jobs for short periods of time, but could not establish employment similar to that which he had held with Heartland.

On February 8, 1999, Gardner filed for workers' compensation benefits with the Iowa workers' compensation commissioner (commissioner). A hearing was held before a deputy workers' compensation commissioner in November 2000. During the course of the hearing, Heartland challenged the commissioner's subject matter jurisdiction over Gardner's claim for benefits. To resolve the issue, the deputy commissioner looked to the statutory extension of jurisdiction in effect at the time of Gardner's injury and determined that subject matter jurisdiction existed. The deputy commissioner went on to decide that Gardner was entitled to three hundred seventy-five weeks of permanent partial disability and additional healing period benefits.

Heartland's subsequent motion for rehearing was granted. The deputy commissioner later issued an amended and substituted decision that reached the same result pertaining to benefits. Heartland then appealed the deputy commissioner's decision to the workers' compensation commissioner. The commissioner affirmed the decision of the deputy commissioner, noting that subject matter jurisdiction existed at the time of Gardner's injury and continued to exist. Heartland then sought and was granted judicial review of the commissioner's decision. The district court affirmed the commissioner's decision, also finding that the subject matter jurisdiction statute in effect at the time of Gardner's injury continued to apply to his claim. Heartland appeals from the district court's ruling on judicial review.

II. Standards of Review.

We typically review a district court's decision on judicial review for correction of errors at law. *Greenwood Manor v. Iowa Dep't of Pub. Health, State Health Facilities Council,* 641 N.W.2d 823, 830 (Iowa 2002). This standard dovetails with our review of jurisdictional questions, which is also for correction of errors at law. *In re Marriage of Engler,* 532 N.W.2d 747, 748 (Iowa 1995). "Thus, our review is limited to whether the district court correctly applied the law." *Greenwood Manor,* 641 N.W.2d at 830.

In construing a statute, "[w]e focus on the intent of the legislature . . . looking first and foremost to the language it chose in creating the act" to determine its intent. *In re Detention of Swanson,* 668 N.W.2d 570, 574 (Iowa 2003). "We read the statute 'as a whole and give it "its plain and obvious meaning, a sensible and logical construction,"'

which does not create an 'impractical or absurd result.'" *Id.* (citation omitted). If necessary, we may also "'look to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage' to aid our interpretation." *Id.* at 574-75 (citation omitted). Our review of a district court's construction of a statute is also for correction of errors at law. *Id.* at 575.

III. Subject Matter Jurisdiction and Extraterritorial Injuries.

1. Background and Underlying Principles.

Subject matter jurisdiction "'is the power to hear and determine cases of the general class to which the proceedings belong.'" *Shirley v. Pothast,* 508 N.W.2d 712, 714 (Iowa 1993) (citation omitted). Through its adoption of Iowa Code chapter 85, "the legislature removed from the district court's general, original jurisdiction, the power to hear claims involving the 'rights and remedies of an injured employee against an employer for industrial injuries' and placed them within the exclusive jurisdictional purview of the [commissioner]." *Id.* at 715 (citation omitted). Thus, subject matter jurisdiction over workers' compensation claims is vested in the commissioner subject to any further circumscription by the legislature. *See id.* at 714-15.

One example of such circumscription is Iowa Code section 85.71, which "governs the [commissioner's] subject matter jurisdiction over workers' compensation claims

based on injuries sustained outside the state."[3] *Heartland Express, Inc. v. Terry,* 631 N.W.2d 260, 265 (Iowa 2001); *see also George H. Wentz, Inc. v. Sabasta,* 337 N.W.2d 495, 500 (Iowa 1983) ("The purpose of Iowa Code section 85.71 is to identify those employees who are entitled to benefits under the Iowa act despite occurrence of an injury out of state."). Prior to the adoption of section 85.71, workers' compensation claimants who had been hired in Iowa could file for benefits in Iowa even if they were injured outside of Iowa. *See* Harry W. Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations,* 24 Drake L. Rev. 336, 351-52 (1975) (citing *Haverly v. Union Constr. Co.,* 236 Iowa 278, 284-90, 18 N.W.2d 629, 633-36 (1945)). However, while Iowa jurisdiction could be invoked based on the sole factor of hiring, many other states' laws were more restrictive in extending jurisdiction over a claimant's claim for benefits arising from an "extraterritorial" injury. *See* The Council of State Governments, *Workmen's Compensation & Rehabilitation Law* § 7 cmt. at 97-98 (1973) [hereinafter Model Act]. For this reason, some workers' compensation claimants injured outside of the territorial

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[3] Gardner argues that Iowa Code section 85.71 relates to the authority of the workers' compensation commissioner over a matter at hand rather than to its subject matter jurisdiction. We have wrestled with applying our definitions and rules pertaining to these two concepts in many other contexts. *See State v. Emery,* 636 N.W.2d 116, 119-20 (Iowa 2001); *In re Marriage of Engler,* 532 N.W.2d 747, 748-49 (Iowa 1995); *State v. Mandicino,* 509 N.W.2d 481, 482-83 (Iowa 1993). However, section 85.71 has previously been interpreted to be a subject matter jurisdiction statute, and we find no reason to diverge from that determination. *Heartland Express, Inc.,* 631 N.W.2d at 265 ("Iowa Code section 85.71 is a subject matter jurisdiction statute.").

limits of their "home" state found themselves unable to bring a claim for benefits in any state. *See id.*

This inequitable result moved the National Commission on State Workmen's Compensation Laws to recommend "that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired." *The Report of the Nat'l Comm'n on State Workmen's Compensation Laws* R2.11, at 48 (1972). Not long after this recommendation was made, the Council of State Governments proposed a model workers' compensation statutory provision "to ensure that [the] tragedy of complete failure of coverage cannot possibly take place." Model Act § 7 cmt. at 98. This provision provided for extraterritorial jurisdiction as long as one of four jurisdictional prerequisites was satisfied:

> [A]n employee suffering an out-of-state injury may recover under this act if his employment is principally localized in this state, *or* he is working under a contract for hire made in this state in employment not principally localized in any state *or* he is working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law is not applicable to his employer *or* he is working under a contract of hire made in this state for employment outside the United States or Canada.

Id.

Although Iowa jurisdiction previously had been interpreted broadly, our legislature chose to add the Council of State Governments' model language in 1973.

1973 Iowa Acts ch. 144, § 29; *see also George H. Wentz, Inc.*, 337 N.W.2d at 500 ("Iowa Code section 85.71 is based on language found in section 7 of the [Model Act]."). In doing so, the legislature incorporated only a portion of the Model Act's definition of the term "principally localized." *See* 1973 Iowa Acts ch. 144, § 29. The Model Act definition of "principally localized" provided:

> A person's employment is principally localized in this or another state when (1) his employer has a place of business in this or such other state and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state[.]

Model Act § 7(d)(4). The legislature defined "principally localized" as requiring that "[the employee's] employer has a place of business in this or some other state and [the employee] regularly works in this state, or if [the employee] is domiciled in this state." 1973 Iowa Acts ch. 144, § 29. Importantly, the legislature chose not to include in this definition the further model language under the second (domicile) clause that permitted an employee to establish principal localization – and thus jurisdiction – if he could show he was domiciled in the state *and* spent "a substantial part of his working time in the service of his employer in this or such other state." Model Act § 7(d)(4).

The main controversy in this appeal arises as a result of a 1997 amendment to section 85.71. *See* 1997 Iowa Acts ch. 106, § 1. This amendment came shortly after our decision in *Henriksen v. Younglove Construction,* 540 N.W.2d 254 (Iowa 1995). In *Henriksen,* we reconsidered our prior interpretations of section 85.71(1), in which we

had determined that that subsection required "a meaningful relationship between the employee's domicile in Iowa and the employment relationship" to establish subject matter jurisdiction in Iowa. *Id.* at 258; *see also George H. Wentz, Inc.*, 337 N.W.2d at 500-02; *Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 533-34 (Iowa 1981). After looking to the plain language of the statute and noting the legislature's failure to include the Model Act language requiring a more extensive relationship, we concluded, "[s]ection 85.71 on its face clearly permits domicile as an independent basis for subject matter jurisdiction." *Henriksen*, 540 N.W.2d at 258.

Not long after this decision, the legislature amended section 85.71:

> Section 1. Section 85.71, Code 1997, is amended to read as follows:
>
> 85.71 ~~EMPLOYMENT~~ *INJURY* OUTSIDE OF STATE.
>
> If any employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee . . . would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee . . . shall be entitled to the benefits provided by this chapter, ~~provided that~~ if at the time of such injury any of the following is applicable:
>
> 1. The employment is principally localized in this state, that is, the employee's employer has a place of business in this or some other state and the employee regularly works in this state, or if the employee's employer has a place of business in this

state and the employee is domiciled in this state ; ~~or~~.

2. The employee is working under a contract of hire made in this state in employment not principally localized in any state~~, or~~ and the employee spends a substantial part of the employee's working time working for the employer in this state.

3. The employee is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to the employee's employer~~, or~~.

4. The employee is working under a contract of hire made in this state for employment outside the United States. . . .

Approved May 2, 1997 [(effective July 1, 1997)]

1997 Iowa Acts ch. 106, § 1; *see also* Iowa Code § 3.7(1) (1999) (providing the effective date for legislation that does not otherwise specify an effective date). Although this amendment had clear ramifications for the application of subsection (1), the legislature's addition of language to subsection (2) also substantially altered the required prerequisites for subject matter jurisdiction under that subsection. In fact, it is the effect of the amendment to subsection (2) that is directly at issue in this case.

Gardner characterizes the main controversy in this appeal as involving a question of retroactive application of Iowa Code section 85.71(2). He argues that the pre-amendment form of section 85.71(2) applies to his claim for workers' compensation benefits given it was in effect at the time he was injured in 1994. As a corollary to this

argument, Gardner asserts that the commissioner properly found that it had subject matter jurisdiction over his claim under subsection (2) of the statute because his contract for hire was made in Iowa and his employment was "not principally localized in any state." *See* Iowa Code § 85.71(2) (1993).

Heartland contends that the post-amendment form of section 85.71(2) applies because the amendment should be applied prospectively, not retrospectively. *See* Iowa Code § 85.71(2) (1999). It further argues that Gardner seeks to create a question of retroactive applicability where none exists. Instead, Heartland points to the timing of the filing of Gardner's petition for Iowa workers' compensation benefits, which, it points out, came over eighteen months *after* the statutory amendment became effective. Based on this timing, Heartland argues the post-amendment statute applies due to the fundamental prerequisite that subject matter jurisdiction exist before a tribunal takes any action in a particular case.

Ultimately, the claims asserted by the parties require us to consider two interrelated issues pertaining to the commissioner's subject matter jurisdiction. First, we must decide which version of section 85.71(2) applies to Gardner's cause of action: the pre-amendment version that existed at the time of his injury or the post-amendment version that existed at the time his petition for workers' compensation benefits was filed. Second, we must determine whether Gardner's claim for benefits falls within the commissioner's jurisdiction under the appropriate version of section 85.71(2).

2. Which Version of Section 85.71(2) Applies?

Several fundamental principles related to subject matter jurisdiction guide our determination of the first issue. We launch from the premise that "jurisdiction [must] be established as a threshold matter," a requirement that "'spring[s] from the nature and limits of the judicial power' . . . and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210, 227 (1998). For this reason, a court without subject matter jurisdiction over a particular area "'cannot proceed at all in any cause.'" *Id.* at 94, 118 S. Ct. at 1012, 140 L. Ed. 2d at 227 (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264, 265 (1869)). The fundamental nature of subject matter jurisdiction makes the issue "an abstract inquiry *unrelated and precedent to* the rights of the parties to a particular case." *In re Guardianship of Matejski,* 419 N.W.2d 576, 579 (Iowa 1988) (emphasis added).

Courts have long recognized that "'the jurisdiction of the [c]ourt depends upon the state of things at the time of the action brought.'" *Keene Corp. v. United States,* 508 U.S. 200, 207, 113 S. Ct. 2035, 2040, 124 L. Ed. 2d 118, 127-28 (1993) (collecting cases and quoting *Mollan v. Torrance,* 22 U.S. (9 Wheat.) 537, 539, 6 L. Ed. 154, 155 (1824)); *Powell v. Khodari-Intergreen Co.,* 303 N.W.2d 171, 172 (Iowa 1981); *see also Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry.,* 270 U.S. 580, 586, 46 S. Ct. 402, 405, 70 L. Ed. 743, 746 (1926); *Anderson v. Watt,* 138 U.S. 694, 702-03, 11 S. Ct. 449, 451, 34 L. Ed. 1078, 1081 (1891); *Secrest v. Simonet,* 708 P.2d 803, 807 (Colo. 1985); *Davis v. Davis,* 799 S.W.2d 127, 131 (Mo. Ct. App. 1990); *Travelers Indem. Co. v. Montelongo,* 785 S.W.2d 436, 438 (Texas Ct. App. 1990). Although this principle is often

applied in light of the parties' status – most often in light of their domicile or a change in that domicile – this "state of things" also includes and requires an application of the jurisdictional law *at the time the suit is filed. See In re Lewis,* 45 B.R. 27, 30 (Bankr. W.D. Mo. 1984); *In re Quinn,* 44 B.R. 622, 625 (Bankr. W.D. Mo. 1984); *Guy v. Am. Fed'n of Gov't Employees,* No. 71 (No. 2501), 1987 WL 5168, at *5 (Tenn. Ct. App. Jan. 9, 1987). Ultimately, because subject matter jurisdiction goes to the core of the judicial power, it must exist in light of the law pertaining to subject matter jurisdiction at the time that judicial power is exercised. *See Steel Co.,* 523 U.S. at 94, 118 S. Ct. at 1012, 140 L. Ed. 2d at 227.

Gardner contends the commissioner correctly invoked the subject matter jurisdiction statute in place at the time of his injury. Yet, at the time of his injury, the commissioner had not been asked to exercise its judicial authority. Only at the time he filed his claim – which was after the amendment to section 85.71(2) – was the commissioner called upon to exercise its authority. It was at that point that the commissioner was required to look inward to determine whether subject matter jurisdiction existed under the law related to its jurisdiction as it stood at that time. *See Bailey v. Batchelder,* 576 N.W.2d 334, 337-38 (Iowa 1998). When the commissioner did otherwise – looking back and assuming jurisdiction based on 1994 law – it focused on the parties' status predominantly to determine whether it conferred jurisdiction. Yet, jurisdiction cannot be conferred based on the parties' status alone; it is a statutory and constitutional inquiry. *See Smith v. Smith,* 646 N.W.2d 412, 414-15 (Iowa 2002); *see also Matejski,* 419 N.W.2d at 579. The commissioner's subject matter jurisdiction must be considered in light of the law at the time

the suit was filed, which included the amendment to section 85.71(2).

3. Applying the Post-Amendment Version of Section 85.71(2).

We must next determine whether Gardner "[was] working under a contract of hire made in this state in employment not principally localized in any state" *and* spent "a substantial part of [his] working time working for the employer in this state." Iowa Code § 85.71(2) (emphasis added). Both parties seemingly concede that Gardner "work[ed] under a contract of hire made" in Iowa and his employment was "not principally localized in any state." *Id.* Presumably, the latter fact is established by evidence that Gardner's actual transportation work for Heartland took him to approximately forty states and he spent no more or less time in any one state. Heartland uses this evidence to argue that because Gardner spent only 2.5% of his working time in Iowa he did not spend "a substantial part of [his] working time working for the employer in this state." *Id.* It believes that *in proportion to* his total work time, Gardner's time in Iowa was not substantial. Gardner contends that his working time in Iowa was substantial in light of the fact that his work was evenly spread throughout forty states and was not any more substantial in any one place. He believes that *in relation to* his total work time, his time in Iowa was substantial.

Iowa Code section 85.71 does not include a definition of the term "substantial." *See id.* § 85.71. In the absence of a legislatively provided definition, we must employ our normal tools of statutory interpretation to define the term and interpret the statute. *See Swanson,* 668 N.W.2d at

574-75. As we undertake this analysis, it is important to note that the issue of what is meant by "a substantial part of the employee's working time working for the employer in this state" is substantially clouded by the statute's current structure. Iowa Code § 85.71(2); *see also id.* § 85.71.

In *Henriksen,* we noted that the legislature had not included additional definitional language from the Model Act under the second (domicile) clause of Iowa Code section 85.71(1). 540 N.W.2d at 257. This language encompassed the "requirement that the employee 'spends a substantial part of his working time in the service of his employer in this or such other state'" in addition to being domiciled in the state. *Id.* (citation omitted). When amending section 85.71, the legislature chose to add the "substantial part" language to the statute but placed it in subsection (2) rather than with the second (domicile) clause of subsection (1). *See* 1997 Iowa Acts ch. 106, § 1. This has created a statute that is arguably contradictory and clearly different from other state statutes pertaining to extraterritorial jurisdiction. This has the further effect of making it difficult to find prior decisions of other courts dealing with the precise "substantial part" question raised in this appeal. *See Swanson,* 668 N.W.2d at 574-75.

Iowa Code section 85.71(2) requires that a contract for hire be made in Iowa for employment not principally localized in any state *and* that the employee spend "a substantial part of [his] working time working for the employer" in Iowa. Iowa Code § 85.71(2). Both the Model Act and other state statutes require that only the first and second of these requirements be met. *See* Model Act §§ 7(a)(2), (d)(4); *see also* Ala. Code § 25-5-35(d)(2) (2000); Ky. Rev. Stat. Ann. § 342.670(1)(b) (Michie 1997); N.M

Stat. Ann. § 52-1-64(B) (Michie 2003); 77 Pa. Cons. Stat. Ann. § 411.2(a)(2) (West 2002). The Model Act approach permits a worker who has "transitory employment" – such as a truck driver – to establish jurisdiction within the state in which his contract was created so long as his employment has not subsequently focused on another state ("principally localized") so as to trump the state of contracting's public policy interest in supervising contracts formed within its borders. *See* 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 143.04[2][c], at 143-24 to -25 (2003) [hereinafter Larson].[4] Moreover, this approach is consistent with traditional applications of various principles related to contract formation and workers' compensation law. *See id.* § 143.03[1]. In fact, this was essentially the status of Iowa law before section 85.71 was enacted by the legislature in 1973. *See* Dahl, 24 Drake L. Rev. at 351-52.

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[4] The discussion on this point at 9 Arthur Larson & Lex K. Arthur, *Larson's Workers' Compensation Law* § 143.04[2][c], at 143-24 to -25 (2002) [hereinafter Larson] is particularly informative:

> In some kinds of employment, like trucking . . . the employee may be constantly coming and going without spending any longer sustained periods in the local state than anywhere else; but a status rooted in the local state by the original creation of the employment relation there, is not lost merely on the strength of the relative amount of time spent in the local state as against foreign states. An employee loses this status only when his or her regular employment becomes centralized and fixed so clearly in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen so long as the employee's presence in any state, even including the original state, is by the nature of the employment brief and transitory.

However, under Iowa's current section 85.71(2), the legislature has added an additional hurdle that the employee also show he "spends a substantial part of [his] working time working for the employer" in Iowa. The effect of this language is to require an employee seeking to invoke jurisdiction under section 85.71(2) to show that he does not have significant contact with any state while also showing he spends a substantial amount of time in Iowa. This seemingly contradictory result runs contrary to the intent behind the Model Act, which was meant to provide for eased establishment of jurisdiction by a transitory employee like Gardner.[5] *See* Model Act § 7 cmt. at 97-98. Instead of the state simply maintaining its public policy interest in the contract formed within its borders and losing that interest only in light of another state with a higher interest – the state where employment is principally localized – section 85.71(2) may actually make it more difficult for the state to uphold its interest in supervising Iowa contracts. *See* Larson § 143.04[2][c]. In fact, in this case at least, we feel constrained to find that this is just what has happened.

As noted, other states utilizing the "substantial part" language have done so in conformance with the Model Act definition of "principally localized." This definition has been interpreted as requiring an analysis of whether an employee is domiciled and spending "a substantial part of his working time" working in the state only after the first

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[5] This result also bucks traditional applications of contract and workers' compensation theory. *See* Larson § 143.03[1]. We make no comment on what, if any, constitutional issues might also arise from the application of section 85.71(2) in its current form.

method of determining principal localization – which considers the location of the employer's place of business and the employee's relationship to that location – has failed. Model Act § 7(d)(4); *see also Cowger v. Indus. Comm'n*, 728 N.E.2d 789, 795 (Ill. App. Ct. 2000); *Davis v. Wilson*, 619 S.W.2d 709, 711 (Ky. Ct. App. 1980); *Todacheene v. G & S Masonry*, 863 P.2d 1099, 1102 (N.M. Ct. App. 1993); *Lambie v. Workers' Comp. Appeal Bd.*, 736 A.2d 67, 69-70 (Pa. Commw. Ct. 1999). Nevertheless, some courts have had the opportunity to determine what constitutes a "substantial part" within the confines of their respective states' extraterritorial jurisdiction statute. *See Ex parte Tri-State Motor Transit Co.*, 541 So. 2d 557, 558-59 (Ala. Civ. App. 1989); *Seales by Seales v. Daniel Constr. Co.*, 469 So. 2d 629, 630-31 (Ala. Civ. App. 1985), *overruled in part by Ex parte Robinson*, 598 So.2d 901, 904 (Ala. 1991); *Cowger*, 728 N.E.2d at 796; *Davis*, 619 S.W.2d at 711; *Todacheene*, 863 P.2d at 1105-06; *Lambie*, 736 A.2d at 70; *Hiller v. Workmen's Comp. Appeal Bd.*, 569 A.2d 1024, 1028 (Pa. Commw. Ct. 1990); *Robbins v. Workmen's Comp. Appeal Bd.*, 496 A.2d 1349, 1352 (Pa. Commw. Ct. 1985). No jurisdiction has adopted the relative approach advanced by Gardner for determining whether his employment was substantial. Instead, each of the other jurisdictions has simply looked at the whole picture of a claimant's employment to see what proportion of that employment time was spent working in their state.[6]

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[6] Some courts have taken a particularly holistic approach to determining what constitutes "a substantial part of the employee's working time working in [the] state" that examines an employee's employment relationship to an employer in the past, present, and future (as if no injury had occurred) to determine whether a "substantial" part may be

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Significantly, none have found an amount of working time so low as 2.5% to constitute "a substantial part of the employee's working time working for the employer in [the] state." Iowa Code § 85.71(2); *see also Tri-State Motor Transit Co.*, 541 So.2d at 559 (employees' time in state not substantial); *Seales by Seales*, 469 So. 2d at 630-31 (approximately 53% of time spent in state not substantial); *Cowger*, 728 N.E.2d at 796 (infrequent in-state layovers while waiting for work assignments not substantial); *Davis*, 619 S.W.2d at 711 (20% of time spent in state is substantial); *Todacheene*, 863 P.2d at 1106 (prior year of working in state before out-of-state accident is substantial); *Lambie*, 736 A.2d at 70 (two days a week not substantial); *Robbins*, 496 A.2d at 1352 (delivery of fourteen of thirty-seven loads and other driving time substantial).

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established. Iowa Code § 85.71(2); *see also Seales by Seales v. Daniel Constr. Co.*, 469 So. 2d 629, 630-31 (Ala. Civ. App. 1985), *overruled in part by Ex parte Robinson*, 598 So.2d 901, 904 (Ala. 1991); *Todacheene v. G & S Masonry*, 863 P.2d 1099, 1105-06 (N.M. Ct. App. 1993). These jurisdictions seemingly contemplate the inclusion of some normal administrative operations (receiving orders, filing paperwork, etc.) in this calculation. *See Seales by Seales*, 469 So. 2d at 630-31; *Todacheene*, 863 P.2d at 1105-06. While this is an intriguing – albeit little accepted – approach, we are not inclined to adopt it in light of our statute's requirement that an employee spend "a substantial part of [his] *working time working . . . in* the state." Iowa Code § 85.71(2) (emphasis added). Gardner's initial and occasional interaction with Heartland in Iowa involved administrative activities preliminary to his work providing driving and delivery services for the transport of goods or was limited to communication of work assignments and exchanges of paper work. While clearly related to his work, none of these activities significantly increased his *working* time in Iowa. *See id.* Moreover, other subsections of the statute – particularly subsection (1) – appear to already contemplate the role of such administrative activities by considering jurisdiction based on an employer's "place of business." *See id.* § 85.71(1).

Moreover, despite the extensive and convoluted background and evolution of section 85.71(2), the mere fact it was amended by the legislature exhibits some measure of legislative intent. Clearly, the legislature intended to effect a change in the law when it amended subsection (2). The alteration it chose indicates its belief that jurisdiction under subsection (2) should be established by something more than the limited employment-related contact a transitory employee would have with a state in which his employment is not principally localized. In fact, if the legislature had not amended section 85.71(2), jurisdiction *may* have been established based in part on the same key evidence that Gardner does not work more than 2.5% in any one place that he here asserts as evidence that he actually spends "a substantial part of [his] working time working for [the] employer in" Iowa. Iowa Code § 85.71(2). The legislature clearly intended to up the jurisdictional ante by departing from prior law granting jurisdiction based on an employee's contract for hire and limited contact with the state to now require that an employee also spend "a substantial part of the employee's working time working for [the] employer in" Iowa. *Id.*

Ultimately, Gardner simply did not spend "a substantial part of [his] working time working" for Heartland in Iowa. *Id.* For this reason, the statutory prerequisites for the exercise of subject matter jurisdiction over his claim by an Iowa judicial body were not established. *See id.* Gardner's claim was wrongly filed in Iowa. Therefore, we now exercise the duty of any court upon finding that it does not have subject matter jurisdiction and dismiss this action for want of that jurisdiction. *See Steel Co.,* 523 U.S. at 94, 118

S. Ct. at 1012, 140 L. Ed. 2d at 227; *Bailey,* 576 N.W.2d at 337-38.

The result we reach in this case is done with some disinclination. However, while the legislative standard challenged in this case would appear to be capable of being satisfied only in rare circumstances, we cannot say the standard enacted is absurd or ineffectual. Ultimately, we are bound by the separate and distinct roles of our three branches of government and our fundamental and essential respect for the law-making function of the legislative branch. It is outside the role of the judicial branch to intrude into this function. Our respect for this venerable and important principle is greater than any particular unfair result we may perceive in a particular case. If our legislature finds, upon consideration of this case, that the statute at issue indeed functions in a manner that was not anticipated, it can, and, we trust, will, change it to give it different meaning.

REVERSED AND DISMISSED.

All justices concur except WIGGINS, J., who takes no part.

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

HEARTLAND EXPRESS, **Petitioner,** **vs.** **JAMES GARDNER, JR.,** **Respondent.**	**LAW NO. CV 3951** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a Petition for Judicial Review. The court heard the parties' oral arguments on May 1, 2002. Its attorney, Joseph M. Barron, argued the case for the Petitioner-Employer, Heartland Express (hereinafter "Heartland") and his attorney, D. Brian Scieszinski, argued the case for the Respondent-Employee, James Gardner, Jr. (hereinafter "Gardner"). The court has carefully reviewed the record made before the agency, read the parties' briefs and considered their arguments and now, having done so, the court makes the following ruling.

Procedural History

This is a petition under Iowa Code §17A.19 (2001) for judicial review of the action of the Iowa Workers' Compensation Commissioner awarding Gardner permanent partial disability benefits for a work-related back injury that occurred on February 16, 1994.

Gardner filed his claim for workers compensation benefits on February 5, 1999. Hearing was held before the agency on November 6, 2001, following denial of Heartland's motion to continue the hearing date. The deputy worker's compensation commissioner who heard the case

filed his decision on January 24, 2001, concluding that Gardner suffered a seventy-five percent industrial disability as a result of the back injury and awarding benefits accordingly. He later affirmed that decision following rehearing on Heartland's motion. Heartland appealed the deputy's decision within the agency and, on January 15, 2002, Chief Deputy Workers' Compensation Commissioner Heitland (the "chief deputy"), affirmed the deputy commissioner's decision. That decision then became the agency's final action in the matter. Heartland filed its petition for judicial review on February 11, 2002. Both sides have filed briefs in accordance with the court's scheduling order and, as previously noted, the court heard oral arguments on May 1, 2002. A more detailed statement of the procedural history of this case before the agency is set forth below in connection with the court's ruling on Heartland's claim that the agency erred by refusing to grant its request to continue the hearing date.

Statement of Facts

The court does not find facts in a judicial review proceeding. This statement, therefore, constitutes a summary of the agency's factual findings or, in some cases, a statement of evidence presented before the agency.

Gardner is thirty-eight years old. He has a high school diploma and completed three years of college. He began working as a truck driver for Heartland in 1991. His assignments took him to about forty different states, including Iowa. He did not drive in any particular state more than another and spent about the same amount of time working in Iowa as in any of the other states in which he drove.

He injured his back on February 16, 1994 while he was working underneath his truck trailer. The injury occurred in the state of Georgia.

Dr. Bonati, a Florida physician to whom Heartland referred him, performed surgeries related to this injury on July 5 and 12, 1994. These surgeries actually worsened Gardner's pain.

Gardner had additional surgeries in June and November 1995 and in April 1996.

A functional capacity evaluation completed in 1997 concluded that Gardner was limited to performing labor at the "medium physical demand" level. Lifting was limited to fifty pounds with no frequent or constant lifting.

In May 2000, Dr. Riggins, a physician he chose, evaluated Gardner. Riggins concluded that Gardner had a forty-eight percent functional impairment to the body as a whole as a result of the back injury and subsequent surgeries. He recommended work restrictions of no lifting more than thirty pounds, no frequent lifting of more than fifteen pounds and no prolonged sitting for more than two hours.

Since his injury, Gardner has worked off and on at various trucking companies. He testified that he has been unable economically to consistently maintain such employment on a basis where he owns a truck and leases it to a trucking company because of his need to frequently rest his back from sitting, his inability to work longer hours and because he has trouble getting in and out of the truck. At the time of hearing he was employed as a truck driver, on an employee basis. He has also worked at a store that his father owns.

Standard of Review

The standard for district court review of agency action are [sic] well established. The court acts in an appellate capacity to correct the agency's errors of law. *Holland Bros. Construction v. Iowa State Board of Tax Review, 611 N.W.2d 495, 499 (Iowa 2000).* The grounds upon which the court may interfere with an agency decision are set forth in Iowa Code § 17A.19(10) (2001) and include situations where the decision of the agency is based on an erroneous interpretation of law or is not supported by substantial evidence in the record as a whole or is arbitrary, capricious and unreasonable. "Substantial evidence" is evidence "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Iowa Code §17A.19(10)(f) (2001); See also IBP, Inc. v. Harpole, et al., 621 N.W.2d 410, 417 (Iowa 2001).* In determining whether a conclusion is supported by substantial evidence, the court must view the record as a whole. *Id.* The agency is entitled to considerable latitude in making fact-based decisions and an agency's decision cannot be said to be unsupported by substantial evidence merely because inconsistent conclusions can be drawn from the same evidence. *Id.*

The court is not bound by the agency's interpretation of relevant statutes. *Gaffney v. Iowa Dep't of Employment Servs., 540 N.W.2d 430, 433 (Iowa 1995); Madrid Home for the Aging v. Iowa Dep't of Human Servs., 557 N. W 2d 507, 510-11 (Iowa 1996).* The court accords "only limited deference" to an "agency's interpretation of law, including statutory and agency rule interpretations." *Madrid Home, 557 N.W.2d at 510-11.* However, the court gives an agency

determination of law careful consideration in areas within the expertise of the agency. *Id. at 511.* In cases involving interpretation of statutes affecting the agency's work, the court defers to the agency's expertise unless the suggested interpretation is clearly erroneous. *Wiebenga v. Iowa Dep't of Transportation, 530 N.W.2d 732, 734 (Iowa 1995).* Nevertheless, the Court always reserves unto itself the final interpretation of relevant statutes. *Second Injury Fund v. Braden, 459 N.W.2d 467, 468 (Iowa 1990).*

In reviewing the propriety of agency decisions on procedural questions that arise during the contested case proceedings, the court applies an "abuse of discretion" standard. *Blanchard v. Belle Plaine/Vinton Motor Supply Co., 596 N.W.2d 904, 907 (Iowa 1999).* There is no abuse of discretion unless a decision is exercised on grounds or for reasons that are "clearly untenable or to an extent clearly unreasonable." *State v. Christianser, 323 N.W.2d 219, 222 (Iowa 1982).*

Conclusions of Law

Heartland asserts three issues for the court's review: (1) whether the agency had subject matter jurisdiction; (2) whether the agency erred in denying Heartland's motion to continue the contested case hearing; and (3) whether the agency's determination of the degree of Gardner's industrial disability is supported by substantial evidence. The court addresses these issues in the order they are presented.

1. Subject Matter Jurisdiction.

Heartland's claim that the agency lacked subject matter jurisdiction is based on the provisions of Iowa Code § 85.71(2) (2001) which, in relevant part, provides as follows:[1]

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee . . . would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee . . . shall be entitled to the benefits provided by this chapter, if at the time of such injury any of the following is applicable:
>
> > 2. The employee is working under a contract of hire made in this state in employment not principally localized in any state and the employee spends a substantial part of the employee's working time working for the employer in this state.
>
> (underline added and hereinafter referred to as the "new language").

The underlined language of the statute quoted above was added in 1997. Prior to that time, subsection two merely stated; "The employee is working under a contract of hire made in this state in employment not principally localized in any state." (hereinafter referred to as the "old language"). The old language was in effect at the time of Gardner's injury and the new language was in effect at the

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[1] The parties agree, apparently, that subsection two is the only part of §85.71 under which jurisdiction of Gardner's claim could lie. Without actually deciding it, that appears to the court to be correct.

time his claim for benefits was filed and at the time of contested case hearing.

Heartland argues that the language of the statute that was in effect at the time of the hearing is controlling as to the workers' compensation commissioner's jurisdiction or, if not at that time, then at the time the petition was filed. At both of these times, the new language was in effect. Heartland further argues that because Gardner did not spend a substantial part of his working time working in Iowa and he was injured outside Iowa, the commissioner lacked subject matter jurisdiction of his claim.

Gardner argues that the language of the statute that was in effect at the time he was injured applies and that, in any event, he did spend a substantial portion of his working time, working in Iowa. The old language was in effect at the time Gardner was injured.

The law in this area is well settled. Statutes are presumed not to have retroactive application. *Frideres v. Schiltz, 540 N.W.2d 261, 264-65 (Iowa 1995).* The legislature itself has codified this presumption. *See Iowa Code §4.5 (2002)* (*"A statute is presumed to be prospective in its operation unless expressly made retrospective."*) A statute is deemed to be retroactive "if it affects acts or facts which occurred, or rights which accrued, before the law came into force." *Frideres v. Schiltz, supra at 264 (citation omitted).* Clearly, the interpretation of the new language urged by Heartland would give the statute retroactive effect because it would affect Gardner's rights under chapter 85 as of the date he was injured while working. The question then is whether there is an expressed legislative intent to give the statute retroactive application. There is no evidence that the legislature intended the new language to

operate retroactively.[2] The court concludes the old language applies because it was in effect when Gardner's right to compensation arose – when he was injured. Heartland does not dispute that the agency had subject matter jurisdiction under the old language.

Because it is unnecessary, the court does not determine whether the agency had subject matter jurisdiction under the new language.

2. Denial of the Motion to Continue.

During the progression of this case before the agency, Heartland encountered difficulty obtaining Gardner's in-person deposition and, in January 2000, filed a motion to compel. On March 8, the deputy commissioner to whom the case was then assigned entered an order for Gardner to show cause why his claim should not be dismissed for failure to prosecute. That order required Gardner to make himself available to be deposed within thirty days. Although he made himself available for telephonic deposition by Heartland on April 3, he did not notify the agency of this fact and so, on April 17, his claim was dismissed. Shortly thereafter the claim was reinstated when he notified the agency that he had complied with the March 8 order. The parties participated in an unsuccessful mediation conference before the agency on May 8, 2000. Counsel for Heartland states that the deputy commissioner who

[2] The court also rejects the argument that §85.71 only affects procedural matters and should for that reason be given retroactive application. The court concludes that the statute affects substantive rights in the same way as a change in a statute of limitation would do so.

presided at the mediation "indicated the case was going to go back into normal rotation for a new Prehearing Conference Report." *Petitioner's Brief p.4.* This fact does not appear to be disputed and, apparently, means, according to standard procedures, that no actual hearing date would be set before a prehearing conference was held. Instead, on August 25, 2000, the commissioner issued an order setting the case for hearing on November 6, 2000. On September 29, 2000 Heartland moved to continue hearing date and asked that the case be scheduled for a prehearing conference. Heartland asserted that it had not had time to complete medical discovery because of the delays encountered in deposing Gardner.[3] The motion was denied on the ground that the reasons given in support of it had no merit. *Ruling on Motion for Continuance, entered October 16, 2000.* Heartland renewed its motion at the time of hearing. The deputy commissioner hearing the case affirmed the prior denial on the ground that the order setting the hearing required emergency grounds for any continuance and the reasons stated did not constitute emergency. *Hearing Transcript p. 6.* In his written ruling following the hearing the deputy expanded the reasons for denial of the continuance to include his conclusion that Heartland had ample time to complete discovery before the hearing.

Heartland claims that the agency erred by refusing to grant the requested continuance. It claims it was prejudiced because it did not have time to conduct medical discovery, including obtaining an independent medical

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[3] Heartland deposed Gardner by phone on April 3, 2000 and in person on September 11, 2000.

examination. Its argument is premised on the assertion that its standard practice is to depose the claimant before engaging in any other type of discovery. The purpose of this strategy is to tie down the claimant and provide focus for further discovery. Heartland bolsters its argument by asserting that it has the right to choose the order in which it conducts discovery.

As noted above, to prevail on this issue Heartland must convince the court that the denial of its motion to continue the hearing was an abuse of discretion. It clearly has not met this burden.

Accepting that a deputy commissioner stated at the mediation conference that a new pretrial conference would be set before a hearing date was set, there is no showing in the record that the procedure the agency followed thereafter violated its rules or was otherwise improper, in and of itself. Heartland has pointed to nothing that entitled it to a second pretrial hearing under the agency's procedural rules.

Moreover, accepting that Heartland's counsel relied on the statement of the deputy that another pretrial conference would be set, the court agrees with the agency's determination that Heartland's claim of prejudice is nevertheless without substantial merit. The entire premise of Heartland's argument is that it could not conduct medical discovery until it deposed Gardner and that it encountered difficulty in doing so. First, Heartland did depose Gardner – in April, by phone. There is no explanation why medical discovery could not have been initiated after that deposition. Second, while there is no doubt that Heartland could conduct discovery in any way it wanted, the agency was correct in concluding that a party's strategic choice in that regard cannot control the progression of

the case. Third, as the agency also noted, Gardner filed his claim with the agency in 1999. He had reached maximum improvement from the injury in 1996. All of the physicians who treated him prior to then were chosen, or approved, by Heartland. Under these circumstances, the agency's conclusion that Heartland had ample opportunity to prepare its defense cannot be called an abuse of discretion.

3. The degree of disability.

Heartland lastly argues that the evidence does not support the agency's determination of the degree of Gardner's industrial disability.

Where the alleged disability results from an injury that is not "scheduled" under Iowa Code §85.34(2) (2001), a fact that is not disputed in this case, the degree of disability is measured by the concept of "industrial disability" which is a measure of the injured worker's lost earning capacity. Factors that are to be considered in assessing industrial disability "include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted." *Quaker Oats Company v. Ciha, 552 N.W.2d 143, 157 (Iowa 1996).* The focus is on the ability of the worker to be gainfully employed, not merely on what the worker can and cannot do. *Second Injury Fund v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995).* In reviewing the propriety of the agency's determination of the degree of industrial disability, again, the court does not substitute its judgment for the agency's but merely determines if the agency applied the correct legal standards and if the decision is supported by substantial evidence in the record [as] a whole.

The deputy commissioner's reasoning in assessing a seventy-five percent industrial disability is explained at pages six through eight of his written decision. The deputy accurately sets forth the legal precepts controlling a determination of industrial disability.

Heartland first argues that the deputy did not give meaningful consideration to its exhibits.[4] It was wrong for the deputy to make his decision without having Heartland's exhibits to consider – unless he felt he could adequately consider and remember them as they were presented. However, the unfortunate circumstance of the deputy issuing his initial decision without having Heartland's exhibits is not in and of itself grounds for reversal. The important consideration is that, other than the matters that are discussed below, Heartland fails to specifically show how the deputy's findings are unsupported because of his failure to adequately consider its exhibits.

Heartland then argues that the deputy's decision is not supported by substantial evidence because the evidence does not support the deputy's statement that Gardner was "completely honest." Heartland points out that Gardner displayed a poor memory during his deposition of an incident involving an alleged threat he made against a Heartland supervisory employee. The deputy actually

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[4] It is undisputed that the deputy issued his decision without having Heartland's exhibits because Heartland's [attorney had] taken the exhibits after the hearing in order to organize and resubmit them. Counsel failed inadvertently to return the exhibits. When this was brought to the deputy's attention he granted Heartland's motion for rehearing and then issued a second opinion that is nearly identical to the first.

stated "Claimant appears to have been completely honest with his subjective complaints of pain and physical ability subsequent to having four surgeries." This statement is clearly supported by the evidence even if Gardner was dishonest in his deposition about the threat incident.

Heartland next argues that the deputy's decision is not supported by substantial evidence because the deputy's statement that "[g]enerally, truck drivers must load and unload cargo as part of their daily job duties" is unsupported by the evidence. The court agrees that this finding is not supported by direct evidence in the record. The evidence indicated that Gardner was required on occasion to load or unload when he worked for Heartland. Gardner has since held other truck driving jobs that, apparently, did not require regular loading or unloading. This, however, does not require reversal. The deputy's conclusion that Gardner's inability to lift more than fifty pounds impacts adversely on his employability as a truck driver is supported in the record. There was no evidence that Garner [sic] could continue his job at Heartland despite the lifting restriction since he was only occasionally required to load or unload trucks. Thus, the lifting restriction clearly has an impact even if lifting is required only occasionally. Second this was only one of the factors the deputy considered and it as not given undue weight when considering the deputy's reasoning as a whole.

Heartland next argues that the deputy recognized that Dr. Riggins functional impairment rating of forty eight percent of the body was too high but accepted it simply because Heartland presented no contrary evidence. In reading the deputy's decision, one can understand the thrust of Heartland's argument. The deputy states that the impairment rating is "extraordinarily high" and

"[w]hile this rating is undisputed, it is viewed with some criticism as it is from an independent medical evaluator." *Decision pp. 7-8.* The deputy then concludes that the impairment rating "must be given considerable weight in light of the fact that it stands unrefuted. . . . " *Id.* Certainly, a decision maker should not give weight to evidence found to lack credibility inherently merely because there is no contrary evidence. However, the court cannot conclude that this is exactly what the deputy meant he was doing. Rather, the court concludes the deputy did evaluate this evidence on its own merit and did not give it more weight than it deserved. The deputy's statements about the employer not presenting contrary evidence seems to the court to have been merely a response to Heartland's criticism of the Riggs' [sic] opinion. The deputy could make these statements and still, as he indicated, view the Riggs [sic] opinion with some criticism. Further, the deputy clearly recognized that the functional impairment rating was only a factor to consider.

Finally, Heartland argues that the deputy did not consider that at the time of hearing Gardner was earning nearly the identical amount that he was earning while working for it. Heartland answers its own argument in this respect by acknowledging that actual earnings are not dispositive of the issue of earning capacity. Further, the deputy did make accurate findings concerning Gardner's earnings at the time of hearing. The court cannot say, therefore, that he did not consider this evidence.

It is simply not this court's proper role to substitute its judgment for that of the Workers' Compensation Commission. Hearing the same evidence, the court may very well have reached a different conclusion regarding the degree of Gardner's industrial disability than did the

deputy compensation commissioner. But that is not the proper standard for decision.

For all the reasons stated above, the court cannot conclude that the agency's determination is unsupported by substantial evidence.

RULING

For all the reasons set forth above it is the ruling of the court that the decision of the Iowa Worker's Compensation Commissioner in this matter is **AFFIRMED** in all respects and the petition for judicial review is dismissed. The costs of this action are assessed against the Petitioner.

IT IS SO ORDERED June 5, 2002.

/s/ Douglas F. Staskal
DOUGLAS F. STASKAL
Judge of the Fifth Judicial
District of Iowa

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X

Copies to:

Stephen W. Spencer
Joseph M. Barron
Attorneys at Law
P.O. Box 9130
Des Moines, IA 50306-9130
Attorneys for Petitioner

D. Brian Scieszinski
Attorney at Law
801 Grand Avenue, Suite 3700
Des Moines, IA 50309
Attorney for Respondent

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES GARDNER, JR.,	:	
Claimant	:	File No. 1074594
Vs.	:	APPEAL
HEARTLAND EXPRESS,	:	DECISION
Employer, Self-Insured, Defendant.	:	(Filed Jan. 15, 2002)

Pursuant to Iowa Code sections 86.24 and 17A.15 the chief deputy workers' compensation commissioner affirms and adopts as final agency action those portions of the proposed decision in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

There is no authority for the proposition that the subject matter jurisdiction amendment to Iowa Code section 85.71, adopted in 1997, should be applied retrospectively to this 1994 injury. Subject matter jurisdiction existed at the time of the injury and that jurisdiction was not lost because of a later change in the Code section.

Defendant is not entitled to a continuance. Defendant had ample time and opportunity to conduct discovery prior to the hearing, even with claimant's initial non-cooperation with the scheduling of a deposition. Defendant's counsel's personal preference to conduct a deposition first and postpone all other discovery efforts until after the deposition is not controlling. Defendant

delayed conducting other discovery at its own risk and a continuance of the hearing was not appropriate.

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Pursuant to a standing order of delegation of authority by the workers' compensation commissioner pursuant to Iowa Code section 86.3, the undersigned enters this decision for the workers' compensation commissioner. There is no right of appeal of this decision to the workers' compensation commissioner. Appeal of this decision, if any, would be by judicial review pursuant to Iowa Code section 17A.19.

Signed and filed this 15th day of January, 2002.

/s/ Jon E. Heitland
JON E. HEITLAND
CHIEF DEPUTY
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Mr. D. Brian Scieszinski
Attorney at Law
801 Grand Ave. STE 3700
Des Moines, IA 50309

Mr. Stephen Spencer
Mr. Joseph Barron
Attorneys at Law
PO Box 9130
Des Moines, IA 50309

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES C. GARDNER, JR., Claimant, vs. HEARTLAND EXPRESS, INC., Employer, Self-Insured, Defendant.	File No. 1074594 ARBITRATION DECISION ON REHEARING (Filed Mar. 7, 2001)

STATEMENT OF THE CASE

Claimant filed a petition in arbitration as a result of injuries incurred February 16, 1994 arising out of and in the course of employment with Heartland Express. Defendant admitted liability but disputes entitlement to temporary disability, permanent disability, medical benefits and entitlement to an independent medical evaluation charge.

This case was heard and fully submitted at Des Moines, Iowa on November 6, 2000. The record in the proceeding consists of claimant exhibits A through Q and defendant exhibits 1 through 23; and testimony from James Gardner, Jr.

An arbitration decision was issued January 24, 2001. Employer moved for rehearing February 5, 2001 because employer's exhibits 1 through 23 had not been returned to the file and were not considered. The rehearing was granted February 8, 2001.

D. Brian Scieszinski, Attorney at Law, represented claimant. Stephen W. Spencer, Attorney at Law, represented the defendant.

ISSUES

The parties present the following issues for determination:

1. The causal connection and extent of entitlement to Iowa Code section 85.34(2)(u) industrial disability;
2. Claimant's entitlement to healing period benefits for the period November 10, 1996 through December 11, 1996;
3. The commencement date for payment of permanent partial disability benefits;
4. Claimant's entitlement to Iowa Code section 85.27 medical benefits, their causal connection, fairness and reasonableness of charges, reasonableness and necessity of treatment and authorization defense; and
5. Claimant's entitlement to Iowa Code section 85.39 independent medical evaluation expenses totaling $325.00 accrued with Dr. Riggins.

FINDINGS OF FACT

Having heard the testimony of the witness and having examined all of the evidence in the record, the deputy workers' compensation commissioner finds:

Claimant, James Gardner, Jr., testified in person and under oath. Based upon appearance, action and demeanor

at the time of hearing claimant presented credible testimony. Where conflicts exist in the testimony and documentary evidence claimant's testimony shall be deemed correct. Claimant's testimony is also bolstered by a functional capacity evaluation which eliminated any possibility of symptom exaggeration. Claimant appears to have been completely honest with his subjective complaints of pain and physical ability subsequent to having four surgeries. Since the objective testing falls in direct line with claimant's testimony there is a strong indication that claimant was a truthful witness.

Claimant's injury occurred February 16, 1994 when claimant was attempting to remove a pin from beneath a tractor-trailer. Claimant sustained an injury to the low back and sought medical treatment for the severe complaints of pain. Claimant eventually came under the care of Alfred O. Bonati, M.D., who performed surgery on claimant July 5, 1994 consisting of discogram L5/S1 on the left, lumbar discectomy L5/S1 with transpedicular, lumbar annulorrhaphy, L5/S1 left, thermograpy, L5/S1 left, lumbar facet arthroscopic debridement, L5/S1 left, and release of the nerve of luska/rahizolysis L5/S1 left.

The surgical intervention provided little relief to claimant and actually worsened the condition.

Dr. Bonati did a second surgery July 12, 1994 performing a discogram L4/L5 left, lumbar discectomy, L4/L5 left with transpedicular approach, lumbar annulorrhaphy, L4/L5 left and thermograpy, L4/L5 left. (Claimant Exhibit pages 56 & 60) Prior to receiving surgical intervention by Dr. Bonati claimant had no pain radiating into the legs. Subsequent to the surgery claimant's condition deteriorated significantly with pain radiating into the lower extremities.

Claimant sought treatment from Gary Lowery, M.D., with the employer's authorization. Dr. Lowery attempted to resolve claimant's worsened condition by surgery June 28, 1995 consisting of laminectomy at L5, posterior lumbar interbody fusion, L5-S1 with titanium surgical mesh plus local autograft and moss miami instrumentation, L5-S1. (Cl. Ex. p. 80)

Claimant finally had the last surgery with Dr. Lowery April 30, 1996 where a removal of the moss miami instrumentation with exploration of L5/S1 and fusion work performed. Claimant had a laminectomy of L4, posterior lumbar interbody, L4-5 with carbon fiber cage plus autographed, titanium uss [sic] instrument L4-5 and bilateral transverse process fusion, L4-5 with autograft. Required for the April 30, 1996 surgery was also a harvesting of the left iliac crest bone for grafting (Cl. Ex. p. 85)

As a result of the failed surgeries performed by Dr. Bonati and the corrected surgeries by Dr. Lowery claimant was off work staring [sic] in February of 1994 through December 11, 1996. At issue in this matter is the time period November 10, 1996 through December 11, 1996 as claimant demands healing period for this month.

Dr. Lowery claimant's second treating surgeon indicated that claimant could be released to work 30 hours per week effective November 11, 1996. (Cl. Ex. p. 77) Claimant had previously been a 40-hour or more per week worker with workweeks of up to 70 hours. Claimant reached maximum medical improvement December 11, 1996. (Cl. Ex. p. 78)

The employer had offered claimant the opportunity to take a voluntary job with no pay in November of 1996. Claimant declined such offer of voluntary work as it did

not constitute employment nor was it in his field of expertise or training. It is also noted that claimant was often non-cooperative with attending medical and functional capacity appointments.

As a result of the surgical intervention and work related injury claimant's ability to work has been restricted. A functional capacity evaluation performed July 7, 1997 provided criteria for claimant's work activities. Claimant's material handling activities have been limited to 20 pounds for overhead lifting and 50 pounds for all other types of lifting. Claimant is ailowed only occasional lifting of up to one-third of a workday between 1 and 32 repetitions per day. No frequent or constant lifting is allowed according to the functional capacity evaluation. (Cl. Ex. p. 22)

Claimant's functional capacity evaluation also defined non-material handling activities. Claimant is allowed occasional bending and crawling which means he can do that for 35 percent of the day or zero to 100 repetitions per day. Claimant is allowed frequent standing, sitting, walking, reaching, climbing, squatting, kneeling for between 34 and 66 percent of the day or 101 to 800 repetitions per day. Claimant is completely prohibited from any of these activities on a constant daily basis of 67 to 100 percent of the day or 800 repetitions per day. (Cl. Ex. p. 22)

In summary, the functional capacity evaluation placed claimant in the medium physical demand level for performing physical labor.

Claimant sought independent medical evaluation from Keith Riggins, M.D. No employer-authorized provider had issued an opinion on claimant's permanent partial impairment notwithstanding significant physical limitations

and four surgical interventions. Claimant was evaluated by Dr. Riggins May 9, 2000. Dr. Riggins opined:

> There is considered currently to be 48% impairment of the whole person due to impairment in function of the lumbar spine.
>
> Your letter of May 9, 2000, request that I express an opinion as to whether or not the conditions present in Mr. Gardner's lumbar spine are causally related to his alleged work injury with Heartland Express.
>
> > It is my opinion those conditions are causally related to the injury described as occurring in the employment of Heartland Express on February 16, 1994.

(Cl. Ex. p. 9)

Dr. Riggins also went on to place work restrictions on claimant's vocational activities:

> It is recommended maximum weights lifted be limited to 30 lbs. with frequently lifted weights limited to 15 lbs.
>
> Weights lifted should be confined to the interval between knees and shoulders.
>
> Mr. Gardner is also considered compromised in his ability to engage in activities which placement of the spine in ungainly positions.
>
> Mr. Gardner is also considered compromised in his ability to sit for prolonged periods in fixed positions. It is recommended he [be] provided the option of moving about approximately every two hours.

> It is my opinion that the impairment rating and restrictions set forth above are causally related to the episode of injury described as having occurred on February 16, 1994.

(Cl. Ex. p. 10)

Claimant is also restricted to working no more than eight hours per day pursuant to the functional capacity evaluation.

The deputy workers' compensation commissioner finds that claimant sustained permanent partial impairment to the body as a whole causally connected to the February 16, 1994 work injury. The un-refuted impairment rating from Dr. Riggins of 48 percent is conclusive evidence that claimant did sustain permanent disability causally connected to the February 16, 1994 work injury.

The next issue concerns claimant's entitlement to Iowa Code section 85.27 medical benefits as exhibited in claimant exhibit O.

Claimant demands mileage totaling 12 trips at 300 miles per trip roundtrip from Gainsville to his home for a sum of $1,044.00. Claimant indicated by testimony that this is an estimation of his mileage and cannot be certain of the exact number of miles or the dates the mileage was incurred.

Claimant also demands mileage for 25 trips at 22 miles per trip roundtrip to physical therapy for a total of $159.50. Again, claimant testified that this is an estimation and not exact mileage based upon the exact number of trips.

Claimant also presented an expense for a motel room which was needed so as to obtain surgery in Gainsville. Claimant did not provide a receipt but indicated a cost of $60.00 charged to his mother's credit card.

Claimant also presents a bill of $3,640.00 for Tylenol to treat the low back pain at the rate of $10.00 per week for 52 weeks over a period of seven years. Claimant provided no receipts for the medication and indicated that it was over-the-counter medication as opposed to a prescription.

In summary, claimant's request for Iowa Code section 85.27 expenses is based upon estimations and is not well documented by receipts or contemporaneously executed logs. Claimant has little in the way of supporting documentation to verify the exact amount of money expended for mileage, motel rooms and medication. Claimant has failed to establish by a preponderance of the evidence the exact amount of Iowa Code section 85.27 medical expenses.

Claimant sought independent medical evaluation from Dr. Keith Riggins at a cost of $325.00. Claimant while having four surgical interventions by employer-authorized doctors and a functional capacity evaluation which demonstrated very significant work restriction solicited his opinion of impairment without having an opinion of impairment from an employer-authorized doctor.

Claimant at the time of injury was age 31, born ~~June~~ 26, 1962. Claimant has a high school education and three years of college with no degree from college. Claimant's experience is primarily in the area of truck driving which generally requires heavy manual labor while loading and unloading truck. Claimant has now been precluded from

his heavy manual labor and placed in a medium physical demand level.

Claimant at the time of injury boasted an average weekly wage of $373.44 per week. At the time of hearing claimant had started new employment and was earning 31 cents per mile. Claimant had worked about two and one-half weeks driving 2900 miles which would equate to a weekly wage of about $360.00 per week.

Prior to the work injury claimant worked as an over-the-road truck driver and owner operator driving up to ten hours per day and a maximum of 70 in an eight day period. Claimant is now limited to working about eight hours per day because of significant back pain related to the February 16, 1994 work injury.

REASONING AND CONCLUSIONS OF LAW

The first issue presented for determination is the causal connection and extent of entitlement to industrial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. *Blacksmith v. All-American Inc.*, 290 N.W.2d 348 (Iowa 1980); *Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296 (Iowa 1974).

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given

to the injured employee's age, education, qualifications, experience and inability to engage in employment for which the employee is fitted. *Olson v. Goodyear Serv. Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers

collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. *See Christensen v. Hagen, Inc.,* Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); *Peterson v. Truck Haven Cafe, Inc.,* Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the, disability bears to the body as a whole. Iowa Code section 85.34.

Having established the injury as a cause of permanent disability it follows that the claim must [be] evaluated industrially pursuant to Iowa Code section 85.34(2)(u). The deputy workers' compensation commissioner holds claimant 75 percent industrially disabled. Claimant's work history is primarily in the area of truck driving which requires heavy manual labor. Claimant is now limited to a medium physical demand level and completely restricted from performing constant lifting, sitting, standing, walking, reaching, climbing, squatting and kneeling. This

physical restriction severely limits claimant from accessing his job market in the truck-driving field. Generally, truck drivers must load and unload cargo as part of their daily job duties. Claimant can no longer do so having had four very invasive surgical interventions in the lumbar spines. Claimant while making a good recovery is still in a rather fragile condition having instrumentation and significant surgical intervention in the low back. This severely restricts claimant's ability to access the heavy manual labor job market especially in the field for which he has training and experience.

Also considered is the extraordinarily high permanent partial impairment rating of 48 percent. While this rating was undisputed it is viewed with some criticism as it is from an independent medical evaluator. Nevertheless, the employer had significant opportunity to obtain refuting opinions from the treating doctors. The two surgeons were employer selected and authorized with surgeries performed starting in 1994 with the last surgery performed in 1996. The employer has had years to solicit opinions on the issue of permanent partial impairment yet completely failed to do so. Claimant's petition was placed on file in February of 1999 giving the employer significant advance notice of the need to obtain an opinion on permanent partial impairment. Therefore, the impairment rating must be given considerable weight in light of the fact that it stands un-refuted notwithstanding significant passage of time between the last surgical intervention and the filing of claimant's petition as compared to the hearing date.

It is noted that all industrial disability factors have been considered when addressing the issue of industrial disability. Claimant's age, education and work experience

are also factors in evaluating industrial disability. While claimant does have some college training there is insufficient evidence to demonstrate that this mitigates against a finding of high industrial disability.

The second issue presented for determination concerns claimant's entitlement to healing period benefits.

Iowa Code section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement from the disabling condition. *See Armstrong Tire & Rubber Co. v. Kubli,* 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. *Teel v. McCord,* 394 N.W.2d 405 (Iowa 1986).

The deputy workers' compensation commissioner finds claimant entitled to healing period benefits in addition to those previously paid for the additional period of November 10, 1996 through December 11, 1996. While claimant had been released to return to work it was for only 30 hours per week for this one-month period. The employer's offer of volunteer work is insufficient to qualify as accommodating claimant with light duty employment so as to deny benefits. A volunteer job is clearly not within the parameters as defined in chapter 85.

The commencement date for payment of permanent partial disability benefits is at issue. Having established the last day of entitlement to healing period as December

11, 1996 it follows that the commencement date for payment of permanent disability is December 12, 1996.

The next issue presented for determination concerns claimant's entitlement to Iowa Code section 85.27 medical benefits.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27. *Holbert v. Townsend Engineering Co.,* Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen 1975). Claimant has the burden of proving that the fees charged for such services are reasonable. *Anderson v. High Rise Constr. Specialists, Inc.*, File No. 850096 (App. 1990).

The deputy workers' compensation commissioner holds that claimant has failed to establish entitlement to Iowa Code section 85.27 medical benefits as shown by claimant exhibit O. Claimant has failed to present sufficient evidence to establish the amount of expenses incurred by a preponderance of the evidence. Claimant's estimates are insufficient to establish his burden as a matter of law. Claimant failed to provide corroborating receipts, expenses or contemporaneously created log to demonstrate the exact amount of Iowa Code section 85.27 expenses. Therefore, claimant's request for additional

reimbursement for Iowa Code section 85.27 expenses is denied.

The final issue presented for determination is claimant's entitlement to Iowa Code section 85.39 independent medical evaluation expenses totaling $325.00 for an examination by Dr. Riggins.

Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee's attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See *Schintgen v. Economy Fire & Casualty Co.*, File No. 855298 (App. April 26, 1991). Defendants' liability for claimant's injury must be established before defendants are obligated to reimburse claimant for independent medical examination. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

Claimant has failed to establish that he sought independent medical evaluation from Dr. Riggins because of an evaluation by an employer-retained doctor which he believed to be too low. Since the employer had not solicited an opinion on impairment claimant could not believe the employer's opinion was too low. While in the case at hand this seems a strained interpretation of the statute it

nevertheless follows current agency precedent and strict statutory construction. In this matter claimant had four surgeries on the low back for a work related low back condition. Clearly, claimant had sustained significant permanent partial impairment according to the AMA Guides to the Evaluation of Permanent Impairment, based upon the existence, nature and severity of surgical intervention. Furthermore, bolstering the conclusion that permanent partial impairment was an imminent result of the surgery it is the functional evaluation performed demonstrating significant work restrictions causally connected to the work related low back injury. In conclusion, claimant has failed to establish entitlement to Iowa Code section 85.39 expenses for independent medical evaluation totaling $325.00 because no impairment rating was issued by an employer-selected doctor. Dr. Riggins' expense for independent medical evaluation shall be taxed as a cost at the rate of $150.00.

At hearing the employer moved for a continuance citing the fact that an independent medical evaluation was not obtained by the employer subsequent to the claimant receiving the evaluation from Dr. Riggins in May of 2000. (Cl. Ex. p. 2) The employer's motion to continue was denied as employer failed to comply with the hearing assignment order dated August 25, 2000 which required emergency as grounds for continuance. In support of the denial of the employer's motion to continue it is noted that this matter occurred in February of 1994 with surgery starting in July of 1994 and ending in April of 1996. The multiple surgeries and the functional capacity evaluation clearly demonstrated the existence of permanent partial disability causally connected to the work injury. The employer's motion to continue cannot be considered valid

in light of passage of some four years subsequent to the last surgery with no effort by the employer to obtain a permanent impairment rating from their own authorized doctors. It is also noted that this matter was filed February 8, 1999. Again, the employer sat on its rights with respect to obtaining independent medical evaluations or soliciting opinions on permanent impairment from the treating doctors for some one and one-half years subsequent to the filing of petition.

At hearing the employer also raised the issue of subject matter jurisdiction alleging that claimant had insufficient contact with the state of Iowa to allow the case to go forward. The issue of subject matter jurisdiction is always available pursuant to the Iowa Rules of Civil Procedure. The motion was denied as claimant spent as much time in Iowa as he did in any other state while pursing his vocational activity of truck driving. Therefore, sufficient contact with the state is established so as to allow subject matters jurisdiction pursuant to Iowa Code section 85.71.

ORDER

THE DEPUTY WORKERS' COMPENSATION COMMISSIONER ORDERS:

Defendant Heartland Express, Inc. shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of two hundred sixty and 30/100 ($260.30) dollars per week commencing December 12, 1996.

It is further ordered that defendant shall pay claimant additional healing period benefits commencing November

10, 1996 through December 11, 1996 at the rate of two hundred sixty and 30/100 ($260.30) dollars per week.

It is further ordered that defendant shall receive credit for benefits previously paid if applicable and that accrued benefits shall be paid in a lump sum with interest pursuant to Iowa Code section 85.30.

It is further ordered that costs shall be paid by defendant pursuant to rule 876 IAC 4.33 with claim activity reports filed pursuant to 876 IAC 3.1.

Signed and filed this 7th day of March, 2001.

/s/ Marlon D. Mormann
MARLON D. MORMANN
DEPUTY WORKERS'
COMPENSATION
COMMISSIONER

Copies to:

Mr. D. Brian Scieszinski
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309

Mr. Stephen W. Spencer
Attorney at Law
PO Box 9130
Des Moines, IA 50306-9130

BEFORE THE DIVISION OF
WORKERS' COMPENSATION

JAMES GARDNER, JR.,	)	
Claimant,	)	
vs.	)	FILE NO. 1074594
HEARTLAND EXPRESS,	)	TRANSCRIPT OF PROCEEDINGS
Employer, Self-Insured, Defendant.	)	

The above-entitled matter came on for hearing before MARLON D. MORMANN, Deputy Industrial Commissioner, commencing at 1:10 p.m., November 6, 2000, at 1000 East Grand Avenue, Des Moines, Iowa.

* * *

[59] I'm even reading these things right. I'm reading this top part here.

A. That's not correct. You must go down here to the amount total due to the owner because first you're looking at what's – after they take out lease payments and fuel, that's on the back page back there would be where you find out how much you made.

Q. What I'm looking for right now is just the gross amounts. Would this be the right number then? Am I looking at the right gross amounts before they start deducting expenses?

A. Yes. That's right.

Q. So, for instance, on this one, your gross was 2,900 for those trips.

A. Okay.

Q. And after they – you ended up taking out all kinds of things like fuel, taxes, and tires and what have you?

A. Right.

Q. You were paid $1,106.13.

A. Right. Not every day is a bad day.

MR. SPENCER: Your Honor, for what it's worth, I would like to offer those as Exhibit 23 collectively. And, again, as with

* * *

[68] headquarters here in Iowa. Did you as part of your work with Heartland transverse the state of Iowa heading to places and heading back to places?

A. Transverse, mean pass through?

Q. Yes.

A. Yes, I did.

Q. Do you ever in the time that you worked for Heartland ever pick up any loads or drop off any loads in the state of Iowa?

A. Yes.

Q. Do you remember having a feel for how often you did that during the couple years you worked for them?

A. I can't give you an honest percentage on it. It's not – I don't think it would be as high as 20 percent, but I don't think – I'm not – it's not 20 percent. I'm sure it's scattered out as much here as – what happened in Iowa has happened in the rest of the states that we traveled in.

Q. Was there any state or groups of states that you believe you worked in the most?

A. None.

Q. I know, for instance, you lived down in [69] Georgia or Florida?

A. Right.

Q. Did you tend to drive around Georgia, Florida, southeast United States at any time?

A. Very little on a load going down – that would take me home about – average of once in two or three weeks, then, right back out again.

Q. Well, if I remember the number of states that you talked about, you've probably driven in about 40 states. Would you agree with that as an estimate?

A. Possibly, yes.

Q. If you drove fairly equal amounts of time in each state, that meant you spent about 2 and a half percent of your time in each state. Do you think that's about right?

A. Well, there would be states even though I would go there for Heartland, Heartland did business there, I didn't do that much there, such as the state of Minnesota and the state of Texas, New York State.

Q. Would Iowa be one?

A. Well, with Amana here and sometimes I would stay maybe two days around here to go to [70] Amana and pick up – shuttle refrigerators to Mount Joy back and forth, you know. So the time worked out – couldn't say I was here more than I was anywhere else. And I couldn't say I was less here more I was here less any more than anywhere else if that's what – did that answer your question?

Q. Close as I think we're going to get.

MR. SPENCER: Your Honor, at this time I wanted to – I'd like to add subject matter jurisdiction as one of our issues for this hearing. It was contained on the prehearing conference report and I forgot to put it on the hearing report that we handed in to you at the commencement of this hearing. And I would like to add 85.71 as an issue.

THE COURT: Response by Claimant.

MR. SCIESZINSKI: Your Honor, I believe that the Claimant does have subject matter jurisdiction in the matter and we'd refer the Court to the statute as it existed at the time of the injury.

THE COURT: What's the factual basis for subject matter jurisdiction? I realize that subject matter jurisdiction [71] according to the Rules of Procedure is always an issue. Nevertheless, I'd like to know factual basis for it at this time.

MR. SPENCER: Essentially, Your Honor, I believe we're dealing with 85.71. Mr. Gardner has testified that he has lived either in Georgia or Florida so was not a domicile to the state of Iowa, although maybe his contract of employment may have occurred here. Under state of

Iowa. I think under the code section, he needs to perform a substantial or – I forget what the term is that the code actually uses, but a substantial amount of his work also has to be within the state of Iowa. And I do not believe that's the case in Mr. Gardner's case. So I do not believe he'll fit under any one of the four sections of subsection 85.71 of our code.

THE COURT: So your allegation is amount of work that is done in Iowa does not – is not sufficient to create subject matter jurisdiction. It's not that he didn't have a contract that was created here. It's strictly the amount of work.

MR. SPENCER: Right.

[72] THE COURT: Any response?

MR. SCIESZINSKI: Your Honor, if I'm understanding the argument being made, it's 85.71 also, I believe is the argument whether it falls under that code section. That code section has actually been amended in 1997, I believe, and the code section as it existed at the time of the injury states that if the contract of hire is made here and, as I interpret it, not more than 50 percent of his work is performed in another state, then Iowa does have jurisdiction.

So the question isn't whether 50 percent of the time is spent in Iowa. The question is whether there's other states where more than 50 percent of the time is spent. Mr. Gardner's case, it's clear that he's an over-the-road trucker. He does not spend a significant majority of his time in any one state. Therefore, he would fall under the jurisdictional requirements in 85.71 as it existed at the time of his injury and applies in this case.

THE COURT: Motion is denied on subject matter jurisdiction. I'm not going to [73] take it up as an issue. It is an issue, but I don't believe there's sufficient factual basis at this point to make it a hearing issue.

Claimant has testified credibly at this point that he spends as much time in Iowa as any other state, which means that he spends a significant amount of work time in the state of Iowa. Therefore, I believe there is subject matter jurisdiction. And I'm making this ruling at this point with these findings so that in case it needs to go up on appeal you'll have the right to do so. But I'm not going to issue a written decision on this and not make the hearing issue because I'm issuing the order at this point.

With that, please proceed.

MR. SPENCER: Thank you, Your Honor.

Q. Mr. Gardner, relating to this new job that you have with Hellwig and Sons – am I saying that right?

A. That's correct.

Q. – you're going to be an employee driver now?

A. I am.

* * *